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V. 2



REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF CHANCERY,

1856 TO 1859,

BY

SIR RICHARD TORIN KINDERSLEY,

VICE-CHANCELLOR.

BY

CHARLES STEWART DREWRY, ESQ.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. IV.

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The Cases in this Volume from page 425 have been reported by Messrs. C. STEWART DREWRY and J. JACKSON SMALE, by whom the Reports in Vice-Chancellor KINDERSLEY's Court will be henceforth conducted.

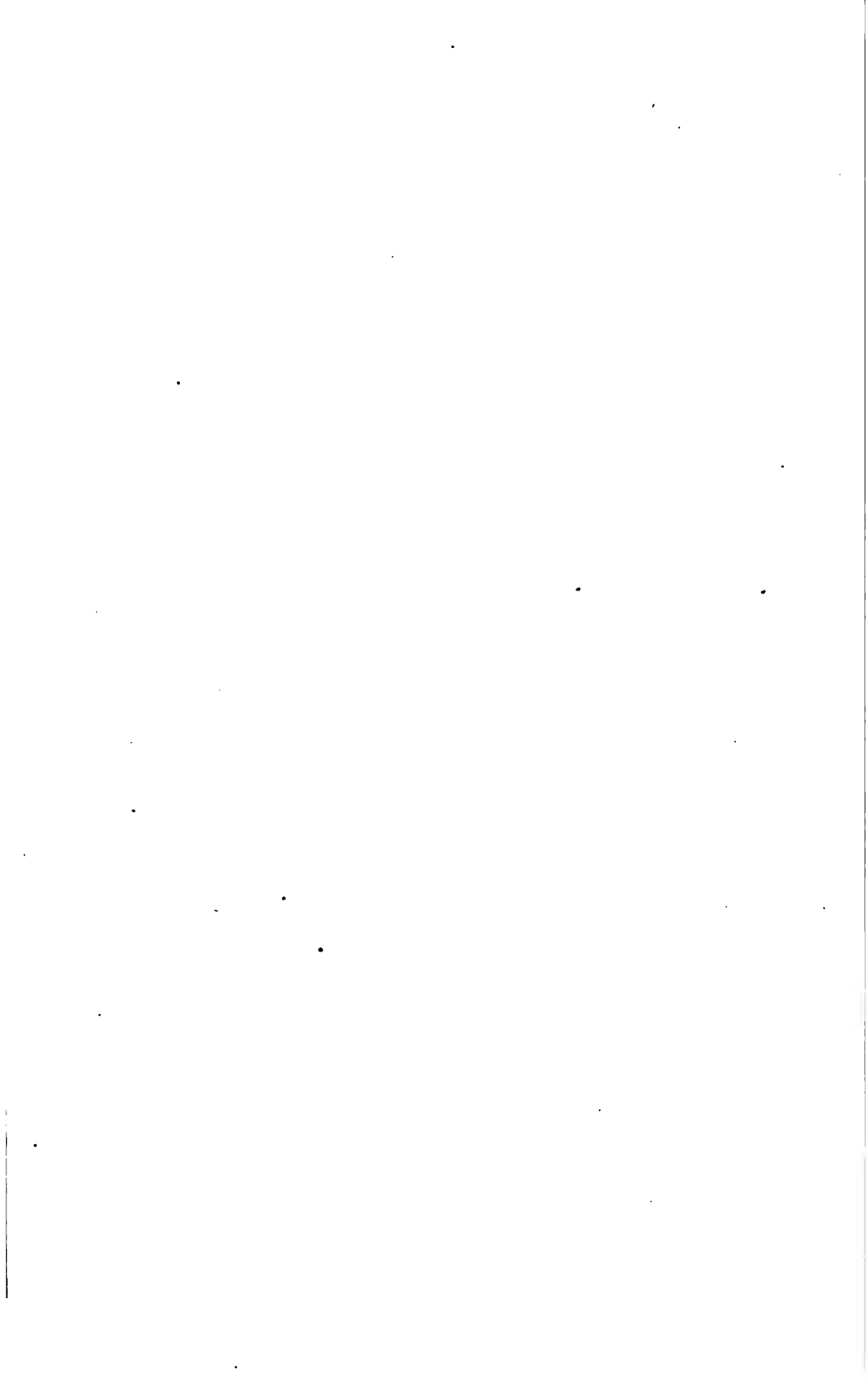


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CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR

SIR R. T. KINDERSLEY.

1856:
November 7,
December
13 and 15.

*Pleading.
Demurrer.
Parties.
Agreement.*

GEORGE BARKWORTH . . . *Plaintiff;*

EMMA YOUNG, Spinster . . . *Defendant.*

THIS case came on upon demurrer.

The bill stated as follows:—

1. On or about the 23rd day of September, 1840, the Plaintiff intermarried with his late wife *Mary Bark-*

to his daughter; but that previously to, and as an inducement to the marriage, *Young* represented to Plaintiff, and *promised and contracted* with him, that he, *Young*, would at his death *leave* to his daughter an equal share with his other children, and the marriage took place on the faith of that promise.

In paragraph 7, it alleged that Plaintiff, on the issuing of a certain commission of lunacy by *Young* against Plaintiff, *filed an affidavit* containing these words: "I say I believe that the said *R. C. Young* is not a man of considerable property, because, on my marriage with his daughter he confessed his inability to give or provide her any marriage portion," and that in reply *Young filed another*, stating thus: "The statement contained in the affidavit of the said *G. Barkworth* (the Plaintiff) that his reason for believing me not to be a man of considerable property is, that on his marriage with my daughter I confessed to him my inability to provide any marriage portion, is not correct; according to the best of my recollection and belief the words I made use of on that occasion were: 'There will be no money for you now, but at my death she (meaning

A bill alleged, in paragraph 2, that on the marriage of the Plaintiff with the daughter of *R. C. Young* no portion was given by *Young*

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worth, then *Mary Young*, spinster, one of the daughters of *Robert Cummin Young*, of &c., since deceased.

2. No portion was given by the said *Robert Cummin Young* to his said daughter or to the Plaintiff upon the said marriage, but previous to, and as an inducement to the Plaintiff to contract such marriage, the said *Robert Cummin Young* represented and stated to the Plaintiff, and expressly promised and contracted with the Plaintiff, that he the said *Robert Cummin Young* would at his death leave to his said daughter the said *Mary Barkworth* an equal share of his property with his other children, and the said marriage took place on the faith of the said representation and promise.

3. At the date of the said marriage the said *Robert Cummin Young* had four children and no more, that is

my late daughter *Mrs. Barkworth*) *shall share* with the rest of my children.'"

Young died in 1855, surviving *Mrs. Barkworth*, having given away his property by will, and not having, by his will or otherwise, made any provision for *Mrs. Barkworth* or her children.

Held on demurrer :—

1. That the Statute of Frauds may be set up by demurrer.

2. That the allegation in paragraph 1 was only of a verbal agreement.

3. That the allegation of the statement by affidavit in paragraph 7 was an allegation of a sufficient note or memorandum in writing of the verbal agreement.

4. That such a memorandum, though written after the marriage, was sufficient.

5. That the agreement might have been performed in two ways ; by *Young* making a provision by will for his daughter, or by dying intestate ; and that though he was precluded by his daughter's death from performing it in the first way, he was not thereby exonerated from making a provision in the way still open to him, of dying intestate ; and, therefore, the Plaintiff's bill, praying for an equal share of the testator's residuary estate, was not on that ground demurrable.

But held, that the representatives of the deceased daughter ought to have been parties.

to say, the Plaintiff's late wife, and the Defendant *Emma Young* and *Ann Jones*, now the wife of the Rev. *Henry Duck*, clerk, and another daughter, *Jessie Young*, who died shortly afterwards unmarried and under the age of twenty-one years, and the Plaintiff has been informed that the said *Robert Cummin Young* never had any other child.

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4. The Plaintiff's said late wife *Mary Barkworth*, formerly *Mary Young*, died on or about the 18th day of May, 1842, leaving issue of the marriage between her and the Plaintiff two children, that is to say *Emily Barkworth* and *Minna Barkworth*, both of whom are now living, infants under the age of twenty-one years.

4a. Letters of administration of the estate and effects of the Plaintiff's said wife *Mary Barkworth* were granted to the Plaintiff by the Prerogative Court of the Archbishop of *York*, on the 24th day of July, 1850, and by the Prerogative Court of the Archbishop of *Canterbury*, on the 19th day of December, 1856, and the Plaintiff is now the legal personal representative of his said late wife *Mary Barkworth*.

5. After the death of the Plaintiff's said late wife *Mary Barkworth*, and at her dying request, the Plaintiff allowed his said children to reside with their maternal aunt the Defendant *Emma Young*, at the house of her father the said *Robert Cummin Young*, where they continued and were brought up by the Defendant, the Plaintiff allowing to the said *Robert Cummin Young* a yearly sum of money more than sufficient to defray all the expenses of their maintenance and education.

6. Sometime in the year 1854, the Plaintiff being

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desirous of having his said children under his own care and protection, determined to remove them from the house of the said *Robert Cummin Young*, and apprised him of such intention; whereupon the said *Robert Cummin Young* most groundlessly, and merely for the purpose of vexation, applied for a commission of lunacy against Plaintiff, and also filed a bill of complaint in this honorable Court against him, in the names of the said children the said *Emily Barkworth* and *Minna Barkworth* in a certain suit instituted for the purpose of compelling the Plaintiff to make some settlement in favour of his said children of certain monies standing in the names of trustees, and to which the child or children of the said Plaintiff were entitled at his death, under the wills of *Elizabeth Barkworth* and *Nancy Barkworth* deceased, subject to a power of appointment by the Plaintiff; and by an order dated the 2nd day of August, 1854, made in the matter of the petition for the said commission of lunacy, it was ordered, that the said petition stand over, and that no further proceedings be taken therein.

7. In opposing the issuing of the said commission of lunacy the Plaintiff filed an affidavit which, so far as the same is material to be herein set forth, was in the words following (that is to say), "I say that I believe that the said *Robert Cummin Young* is not a man of considerable property, because on my marriage with his daughter he confessed to his inability to give or provide her any marriage portion;" meaning, that he confessed his inability to give such portion at the time of the said marriage. And in reply to such affidavit the said *Robert Cummin Young* filed another, which, so far as the same is material, was in the words following, that is to say, "The statement contained in the said copy

affidavit of the said *George Barkworth*, that his reason for believing me not to be a man of considerable property is, that on his marriage with my daughter, I confessed to him my inability to provide him any marriage portion, is not correct; according to the best of my recollection and belief, the words I made use of on that occasion were, "There will be no money for you now, but at my death she (meaning my late daughter Mrs. *George Barkworth*) shall share with the rest of my children," as by such affidavits when produced will respectively appear.

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8. The said *Robert Cummin Young* duly made, signed and published his last will and testament in writing, dated the 3rd day of March, 1856, and thereby, after directing the payment of all his just debts, funeral and testamentary expenses, gave and bequeathed to his daughter, the said *Ann Jane*, the wife of the said *Henry Deck*, the sum of 1,000*l.* to be paid by his the said testator's executrix within one year after his decease; and as to all the rest, residue and remainder of the real and personal estate whatsoever and wheresoever of which he might die seised or possessed, or to which he might be in anywise entitled at the time of his decease, the said testator gave, devised and bequeathed the same to his daughter, the Defendant *Emma Young*, her heirs, executors, administrators and assigns, to and for her own sole and absolute use and benefit; and the said testator revoked all other wills by him theretofore at any time made, and appointed his said daughter, the Defendant *Emma Young*, sole executrix of that his will.

9. The said *Robert Cummin Young* died on or about the 17th day of July, 1855, without having revoked or altered his said will, and the same was duly proved by

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the Defendant, the executrix thereof, in the Prerogative Court of the Archbishop of *York* on the 5th day of August, 1856, and in the Prerogative Court of the Archbishop of *Canterbury* on the 26th day of August, 1856.

10. The said *Robert Cummin Young* did not by his said will or otherwise give or leave anything to his said late daughter *Mary Barkworth*, or to the Plaintiff, or to the Plaintiff's children or either of them.

11. The said *Robert Cummin Young* was not at the time of his death entitled to any real estate, but was possessed of and entitled to personal estate of very considerable value, with the particulars of which the Plaintiff is unacquainted, the Defendant having refused to furnish him therewith.

12. Under the circumstances hereinbefore set forth the Plaintiff submits that he is entitled to have the said representation and contract so made and entered into by the said *Robert Cummin Young* with the Plaintiff on his marriage with his said late wife specifically performed or made good, and that consequently he is entitled in equity to one equal third part or share of the residuary estate of the said testator *Robert Cummin Young*, which one-third part or share the Plaintiff has applied to the Defendant to pay or make over to him accordingly, which the Defendant has refused to do.

The prayer was, That it may be declared by this honorable Court, that under and by virtue of the said contract entered into between the Plaintiff and the said *Robert Cummin Young* previous to the Plaintiff's marriage with his said late wife or otherwise, under the circumstances hereinbefore set forth, the Plaintiff, as the

legal personal representative of his said late wife or otherwise, is entitled to one equal third part or share of the clear residuary estate of or to which the said *Robert Cummins Young* was possessed or entitled at the time of his death.

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2. That the amount and particulars of the said residuary estate may be ascertained, and that one equal third part or share thereof may be ordered to be paid or transferred to the Plaintiff, or otherwise secured for his benefit.

3. That for the purposes aforesaid all such directions, &c.

4. For payment of costs.

To this bill the following demurrer was put in:—

This Defendant doth demur thereto, and for cause of demurrer sheweth, that the said bill doth not contain any matter of equity whereon the Court can ground any decree or give the Plaintiff any relief against this Defendant; and for further cause of demurrer this Defendant sheweth, that it appears by the said bill that neither the promise or contract which is alleged by the bill, and of which the Plaintiff by the said bill seeks to have the benefit, nor any memorandum or note thereof, was ever reduced into writing or signed by this Defendant or any person thereunto by this Defendant lawfully authorized within the meaning of the Statute of Frauds; and for further cause of demurrer this Defendant sheweth, that it appears by the said bill that it is necessary that the estate of the Plaintiff's late wife *Mary Barkworth*, in the said bill named, should be represented in this suit,

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but no legal personal representative is of the said *Mary Barkworth* named a party thereto; wherefore, and for divers other imperfections and good causes of demurrer appearing in the said bill, this Defendant doth demur thereto, and prays, &c.

Mr. *Glasse* and Mr. *Amphlett*, for the demurrer.

Mr. *Jolliffe*, for the bill.

The following cases were cited:—*Hammersley v. De Beil* (a), *Randall v. Morgan* (b), *Montacute v. Maxwell* (c), *Wood v. Midgeley* (d), *Maunsell v. White* (e), *Bold v. Hutchinson* (f), *Archer v. Baynes* (g), *Goodwin v. Fielding* (h), *Bold v. Hutchinson* (i).

Judgment.

The VICE-CHANCELLOR:

The Vice-Chancellor, after stating the nature of the suit, and the material parts of the bill, proceeded as follows:—The first ground of the demurrer is the Statute of Frauds (29 Car. 2, c. 3, s. 4), the Defendant insisting that the bill does not state such an agreement in writing, or such an agreement of which there is a memorandum or note in writing, as will entitle the Plaintiff to relief.

The second ground is, that the father, supposing him to have been originally under an obligation to perform the agreement, was discharged from that obligation by

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|-------------------------|-------------------------|
| (a) 12 Cl. & Fin. 45. | (f) 5 De G. Mac. & Gor. |
| (b) 12 Ves. 67. | 588. |
| (c) 1 Str. 236. | (g) 5 Exch. 625. |
| (d) 5 De G. Mac. & Gor. | (h) 5 De G. Mac. & Gor. |
| 41. | 90. |
| (e) 1 Jones & Lat. 539. | (i) 20 Beav. 250. |

the death of his daughter in his lifetime. I will consider first the objection founded on the Statute of Frauds. The Plaintiff contends, that if the Statute of Frauds is a defence, it cannot be taken by demurrer, but must be by plea or answer.

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Formerly, an impression to that effect certainly prevailed, with regard both to the Statute of Frauds and to the Statute of Limitations; but I never could satisfy myself of the soundness of the objection.

The function of a demurrer is to insist summarily and simply, that on the assumption of the truth of the facts alleged by the bill, the Plaintiff is not according to law entitled to the relief prayed. It is an appeal to the law of which every judge is bound to take notice, and I never could see what difference it could make in this respect, whether the law to which the appeal is made, is that which is founded on general principles of law and equity, or that which rests on the authority of a particular statute, or whether the statute on which it rests is one which destroys the right or only precludes the remedy.

But it is unnecessary to consider the matter on principle, because it has been now quite settled by decision. In *Foster v. Hodgson* (a), Lord Eldon expressed a clear opinion that a Defendant may avail himself by demurrer of the defence afforded him by the Statute of Limitations; and in *Wood v. Midgley* (b), Lord Justice Turner decided the same point with respect to the Statute of Frauds, Lord Justice Knight Bruce concurring.

The next point raised is this:—the defence being that, according to the allegations in the bill, there was

(a) 19 Ves. 180.

(b) 5 De G. Mac. & Gor. 41.

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no agreement in writing signed by the testator, the Plaintiff insists that the allegations of agreement contained in the second paragraph, even if that allegation stood alone, are sufficient to destroy the defence; because, although there is not in express words a statement that the agreement there mentioned was in writing and signed by the testator, yet the statement of the agreement in that paragraph is consistent with the supposition that it was in writing and signed by the testator; and therefore it is insisted that the Defendant ought not to have demurred, but ought to have pleaded the statute with an averment that there was no agreement in writing signed by the testator. [The VICE-CHANCELLOR referred to the second paragraph, ante, p. 744, and then proceeded:]—I am of opinion that this paragraph must be taken to be an allegation of nothing more than a verbal agreement, and that the Defendant may avail himself of the Statute of Frauds by way of demurrer. As a general rule, to render a bill proof against a demurrer, it ought to state all the facts necessary to entitle the Plaintiff to the relief prayed; and if it only states some of them and omits others, it must be assumed that those which are omitted do not exist, unless indeed they are necessarily to be inferred or presumed from what is stated. The maxim applies, "*De non apparentibus et de non existentibus eadem est ratio.*"

Now if the bill states an agreement in writing, it is unnecessary to add that it was signed by the party sought to be charged, because from the statement that it was in writing it is necessarily to be inferred that it was signed; because if the paper was not signed it was not an agreement, as was held by Sir *J. Leach* in *Rist v. Hobson* (a).

(a) 1 Sim. & Stu. 543.

But as a mere verbal agreement is still an agreement, you cannot, from a mere allegation of an agreement, infer or presume that it was in writing. And as the fact that it was in writing is neither expressly alleged in the bill nor necessarily to be inferred or presumed from what the bill does allege, the mere allegation of an agreement amounts to nothing more than the allegation of a verbal agreement, and then the defence may be made by demurrer. I think this view is strongly supported by the authority of Lord *Thurlow's* observations in *Whitchurch v. Bevis* (a), where he comments on the case of *Child v. Godolphin*, before Lord *Macclesfield*; and Sir *W. Grant's* observations in *Spurrier v. Fitzgerald* (b), where he comments on Lord *Thurlow's* observations above referred to.

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Supposing then there were no other statement in the bill respecting an agreement or promise besides what is contained in the second paragraph, I should decide in favour of the Defendant.

The next question turns on the seventh paragraph of the bill.

The Plaintiff contends that that passage contains an allegation that there was a note or memorandum of the agreement in writing signed by the testator. [His Honor read the seventh paragraph.] This passage in the testator's affidavit the Plaintiff contends is a sufficient note or memorandum in writing, signed by the testator, of the prior agreement within the intent and meaning of the Statute.

Upon this several questions arise. First, the De-

(a) 2 Br. C. C. 559.

(b) 6 Ves. 555.

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fendant objects, that, supposing this was in every other respect a sufficient note or memorandum in writing, it was not made till after the marriage, and therefore is not good within the intent of the statute. And the opinion expressed by Sir *W. Grant* in *Randall v. Morgan* (a) is relied upon. Sir *W. Grant's* opinion is expressed in the form of a strong doubt, and unquestionably even the doubts of such a Judge are entitled to the utmost consideration and deference. But, notwithstanding that doubt, it has been since held by Lord *Langdale* in *De Beil v. Thomson* (b), and by Lord *Cottenham* in the same case on appeal (c), that a written memorandum or note made after the marriage of a parol agreement made before the marriage would be sufficient within the statute; the former referring to Lord *Harcourt's* opinion in *Hodgson v. Hutchinson* (d), and the latter referring not only to that case, but also to Lord *Hardwicke's* decision in *Taylor v. Beech* (e), and to that of Lord *Macclesfield* in *Montacute v. Maxwell* (f). All these opinions must, I think, outweigh Sir *W. Grant's* doubt.

The Defendant next objects that, assuming that a proper memorandum or note in writing made after the marriage would be sufficient, this affidavit of the testator is in no sense a note or memorandum of the alleged agreement; that it was not made with any such intent, but only to rectify a statement made by the present Plaintiff as to what the testator had said on the occasion of the marriage; that it was made in the course of a litigation between the testator and the Plaintiff, totally unconnected with the contract or promise now alleged

(a) 12 Ves. 67.

Cl. & Fin. p. 64.

(b) 3 Beav. 469.

(d) 5 Vin. Abr. 522, pl. 34.

(c) Reported in a note to

(e) 1 Ves. sen. 297.

Hammersley v. De Beil in 12

(f) 1 Stra. 236.

by the Plaintiff; and that it was merely put upon the files of the Court without having been delivered or sent to the Plaintiff or to any other person.

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Now to determine this point it is necessary to consider what was the object of the Statute of Frauds, at least of the fourth section. Its object was to prevent the mischief arising from resorting to oral evidence to prove the existence and the terms of an alleged verbal agreement in certain specified cases, and among the rest an agreement made in consideration of marriage, it having been found that in actions and suits to enforce such agreements they were (in the language of the preamble) "commonly endeavoured to be upheld by perjury and subornation of perjury." It is obvious that there can be no ground to apprehend any such mischief in any case in which you have, under the hand of the party sought to be charged, a written statement of the agreement which he made and of all its terms, and for this purpose it can signify nothing what is the nature or character of the document containing such written statement, provided it be signed by the party sought to be charged; whether it was a letter written by that party to the person with whom he contracted or to any other person, or a deed or other legal instrument, or an answer to a bill, or an affidavit in Chancery or in Bankruptcy or in Lunacy. Thus where a verbal agreement was made for the sale of land, a letter written by the vendor or purchaser to his own solicitor or agent stating the terms of the agreement, and not intended for the inspection of the other party, has been held to be a sufficient note or memorandum within the intent of the statute: *Rose v. Cunyngham* (a), *Welford v. Beazeley* (b).

(a) 11 Ves. 550. (b) 3 Atk. 503, per Lord Hardwicke.

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So a letter written by the vendor to his mortgagee: *Seagood v. Meale* (a). In *Welford v. Beazeley* (b), the Defendant, previously to the marriage of Plaintiff with her daughter, had verbally agreed to give her a marriage portion of 1,000*l*. Articles were executed settling the 1,000*l*. Defendant was not a party to the articles, but signed them as a witness knowing their contents. This was held a sufficient note or memorandum within the intent of the statute. Now in that case the Defendant, in attesting the articles, had no intention of giving a note or memorandum in writing. But Lord *Hardwicke* said, "The meaning of the statute is to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other, and, therefore, both in this Court and in the Courts of Common Law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted upon." I may here add, that it is no doubt on the same principle, that if a bill is filed to enforce a verbal agreement, and the Defendant by his answer simply admits it without insisting on the statute by the answer, the Court will decree performance, notwithstanding that the Defendant, at the hearing, insists on the benefit of the statute, because you have here all that it was the design of the statute to require—a statement of the terms of the agreement in writing signed by the Defendants. Indeed, formerly, this Court went so far as to hold (though the decisions have been since properly overruled), that if the answer contained an admission of the verbal agreement, though accompanied by a protest insisting on the statute, the Plaintiffs should have a decree. I think the principle of all these cases is applicable to the present. We have a writing signed by the testator, stating the fact and the terms

(a) Pre. Cha. 560.

(b) 3 Atk. 503.

of the prior parol agreement or promise; and that is what is required by the intent of the statute. Indeed it is impossible not to feel, that there seems even more justice in binding a person by such a statement of the agreement as is contained in this affidavit, which is prepared with all caution and deliberation, and which, in addition to the party's signature, is stamped with the solemnity of his oath, and which was intended to be perused by the party with whom the contract was made, than by a mere letter addressed to her own solicitor or mortgagee, written perhaps hastily and carelessly, and never intended to come to the knowledge of the other party.


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I am of opinion that the statement in the affidavit of the testator, set out in paragraph seven of the bill, is a sufficient note or memorandum in writing within the intent of the statute.

A third objection raised by the Defendant is, that the bill does not state the affidavit to have been signed by the testator. But I am of opinion that the signature of the testator is to be presumed as inferred from the fact stated that he made the affidavit. An affidavit in lunacy must be signed as well as sworn by the party making it. If you can presume signature from the fact that an agreement was in writing according to Sir *J. Leach's* decision in *Rist v. Hobson (a)*, *à fortiori* you may presume signature from the fact stated that it was an affidavit made by the party. Indeed, if I had arrived at a different conclusion on this point, the only effect would have been that in allowing the demurrer I should have given leave to amend the bill by stating the fact of signature.

(a) 1 Sim. & Stu. 543.

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A fourth objection by the Defendant is, that the statement in the testator's affidavit does not refer to what passed before the marriage. Now it is perfectly true that the Plaintiff cannot rely on a note or memorandum in writing of a prior verbal agreement in consideration of marriage, unless it appears on the face of the note or memorandum that the verbal agreement to which it refers was made before marriage. Does it then appear on the face of the affidavit that what is stated to have passed occurred before the marriage? I think that is the fair construction of the affidavit. The form of it is this; it purports to quote a passage from an affidavit of the present Plaintiff to which it is a reply. The passage thus quoted states a confession made by the testator to the Plaintiff, on his marriage with the testator's daughter, as to his, the testator's, inability to provide a marriage portion. Now it appears to me that a marriage portion, *ex vi termini*, properly means a portion provided to be given by a father to his daughter with a view to an intended marriage, and not any gift made after the marriage. And, therefore, I think that it is reasonable to conclude, in the absence of anything to the contrary, that a discussion or conversation, which took place on the marriage between these parties, on the subject of providing or not providing a marriage portion, took place before the actual marriage. I am of opinion, therefore, that the occurrence referred to, in the passage quoted from the Plaintiff's affidavit, was an occurrence antecedent to the marriage.

Having quoted the passage from the Plaintiff's affidavit, the testator's affidavit goes on to say that the Plaintiff's representation is not correct, and then adds, "to the best of my recollection I believe the words I used on *that occasion* were, there will be no money for

you now, but at my death she shall share with the rest of my children." "The words I used on *that occasion*." What occasion? Why clearly the occasion referred to in the Plaintiff's affidavit, when the conversation took place on the subject of a marriage portion; that is, if I am right in my construction of that passage, an occurrence antecedent to the actual marriage.

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I am therefore of opinion, as far as relates to the first ground of demurrer,—

1. That where the facts appear on the bill the Defendant may avail himself of the defence afforded by the Statute of Frauds, by demurrer.

2. That the agreement stated in the second paragraph of the bill, as having been made previously to and in consideration of the marriage, was only a verbal and not a written agreement.

3. That a note or memorandum in writing, signed by the testator, stating the fact and the terms of the verbal agreement, is sufficient, though written after the marriage.


4. That an affidavit, stating the fact and the terms of the agreement, is a sufficient note or memorandum within the intent of the statute.

5. That the affidavit must be presumed to have been signed by the party making it.

6. That the occurrence mentioned in the affidavit was an occurrence which occurred previously to the marriage.

In short, in my opinion, the bill states a verbal agree-

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ment made by the testator previously to and in consideration of the marriage, that at his death his daughter should have an equal share of his property with his other children, and it states a sufficient note or memorandum in writing, signed by the testator, of such previous verbal agreement; and that therefore, so far as the demurrer is grounded on the Statute of Frauds, it cannot be sustained.

The other ground of demurrer is, that, supposing there was a valid and binding agreement made by the testator, he was discharged from its obligation by the death of his daughter in his lifetime.

This proposition proceeds on the assumption, that the performance of the agreement became impossible by the act of God. Did then the death of the daughter render the performance of the agreement or promise impossible? There is a slight variation of language in the statement of the verbal agreement in paragraph two of the bill, and the statement in the affidavit mentioned in paragraph seven. In the former it is stated to have been an agreement or promise, that he would at his death *leave to his daughter* an equal share of his property with his other children; and, in the latter, that at his death *his daughter should have* an equal share with his other children. But in my opinion there is no difference between the two. Whichever language is adopted, the promise is precisely the same thing. According to either of the two forms of expression, the promise was capable of being performed in two ways; either by bequeathing to his daughter by will an equal share, or by dying intestate and leaving his children to share equally under the Statute of Distributions. If his daughter Mrs. *Barkworth* survived him, either of those two modes would have been a performance of the pro-

mise that he would leave to his daughter, or that his daughter should have an equal share. Now, unquestionably, the death of his daughter in his lifetime prevented his performing his promise in the latter mode. But did it also render it impossible to perform the promise in the former way?

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If the transaction in question had occurred before the Statute relating to Wills (7 Will. 4 & 1 Vict. c. 26), or if Mrs. *Barkworth* had left no issue, I should have been clearly of opinion, that her death in the lifetime of the testator had rendered it impossible to perform the promise in any way whatever. But what was there to prevent the testator from giving by his will to Mrs. *Barkworth* an equal share of his estate? And if he had done so, would it not have been effectual under the thirty-third section of the Wills Act? As Mrs. *Barkworth* left children who survived the testator, it is perfectly clear, that, by virtue of that section, a legacy or share of residue given to her by his will would not have lapsed, if the will had been made before her death; and the only question is whether, if he had made a will in her favour after her death, the effect would not have been the same. This question came before Vice-Chancellor *Wigram* in two different cases, and in both was decided by him in the affirmative.

In *Winter v. Winter* (a), a testator, by a will made before the Wills Act, gave a sixth part of his residuary estate to one of his sons. The son died after the Wills Act came into operation, leaving issue, which issue survived the testator. The testator afterwards made a codicil altering a bequest to another child, and in other respects confirming his will. Sir *J. Wigram* held, that

(a) 5 Hare, 306.

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the case must be considered as if the testator had, at the date of the codicil, made a will in the very words of the former will, in which case there would have been a bequest to a son who was then dead. And he decided, that the words "shall die," in the thirty-third section of the act, meant, shall die after the act comes into operation, and not, shall die after the date of the will making the bequest in his favour; and that the share given to the deceased son did not lapse, but went to the heir of the son so far as it was realty, and to the executor of the son so far as it was personalty. Again in *Mower v. Orr* (a), the testator by a will, made after the Wills Act, gave a share of his residuary estate to one of his sons, who was then dead. The son died after the Wills Act came into operation, leaving issue, which issue survived the testator; and Sir *J. Wigram* held, that the bequest did not lapse, and that the executor of the son was entitled to the share as part of the son's estate. It is true that in *Mower v. Orr*, the testator, when he made his will, was not aware of the death of the son, who died in *Van Diemen's Land*. But I cannot think, that this could make any difference. The case of a testator being aware of the son's death when he makes a will, provided the son died after the Wills Act, is equally within the language of the thirty-third section, and within the principle on which the Vice-Chancellor decided in each of the two cases cited. Indeed there seems good reason for concluding that in *Winter v. Winter* the testator, at the time of making the codicil which re-published the will, was aware of the son's death. The date of the codicil was the 16th February, 1839. The son died on the 23rd November, 1838, and the son's will was proved by his widow on the 8th December, 1838; and there is

(a) 7 Hare, 473.

nothing to lead to the supposition that the son died abroad, or that the father's codicil was made abroad.

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There is a case in the Ecclesiastical Court which might seem at first sight at variance with the decisions above referred to, but which in truth does not conflict with them at all. It is *Wild v. Reynolds* (a). There a testatrix, by a will dated in 1825, gave a legacy to one child, and the residue to her three other children. The three residuary legatees all died *before the Wills Act came into operation*, one of them leaving a child who survived the testatrix. In 1840 (*viz.* after the Wills Act came into operation), the testatrix made a codicil republishing the will, and died in May, 1845. Her executors having renounced, and the testatrix's surviving child being abroad, the grandchild applied for administration with the will annexed. The motion was necessarily *ex parte*. Sir *H. J. Fust*, in granting the application, said, "It is impossible to contend, on an *ex parte* motion, that the codicil of 1840 brings the will within the thirty-third section of the Statute of Wills. I am of opinion that the legacies to the deceased children have lapsed, and are not revived by the codicil of 1840." Now I have no doubt that Sir *J. Wigram* would have given precisely the same opinion in a similar case. The language of the thirty-third section, which is, "When any person being a child of the testator *shall die*," cannot apply to the case where the child was already dead when that act came into operation; and in each of the two cases before Sir *J. Wigram* the very ground of the decision was that the child died *after* the act came into operation. In the present case all the *res gestæ*, including the death of Mrs. *Barkworth*, occurred after the Wills Act came into operation, and I am of opinion

(a) Notes of Cases in Ecc. & Mar. Courts, vol. v. p. 1.

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that if at any time, whether before or after her death, the testator had made a will giving her a share of his property, that would have been good and effectual under the thirty-third section of the Wills Act, and that, therefore, the death of Mrs. *Barkworth* in the testator's lifetime did not render the performance of the testator's promise or agreement impossible.

A case occurred before Sir *James Wigram*, which I think bears strongly on the present. It is *Jones v. How* (a). There a father, on the marriage of his daughter with the Plaintiff, covenanted with the Plaintiff that he would by deed or will give, leave and bequeath to the daughter an equal share of his real and personal estate with his other children. The daughter died in September, 1843, without issue. The father died in 1846, having by his will and codicil, dated respectively in April, 1843, and November, 1844, given his real estate in trust for his widow and daughters. The Plaintiff filed his bill against the executors and devisees, in trust for the execution of the covenant; but the bill was afterwards amended and reframed as a creditors' suit. At the hearing, a case was sent for the opinion of the Court of Common Pleas on two questions: 1stly. Whether Plaintiff had any good cause of action against the executors; and if so, 2ndly. Whether if the testator left no personal estate, but only a certain copyhold estate, the Plaintiff could have recovered any substantial damages in such action. The Court of Common Pleas answered both questions in the negative. The cause coming on upon the equity reserved, the Vice-Chancellor said, "A doubt crossed my mind of this nature: If the will of the covenantor had contained a provision in favour of the lady, and she had left issue living at her death, the

(a) 7 Hare, 267.

new Wills Act would have prevented lapse ; and a doubt occurred to me, whether the covenantor might not have made a will, so as to preserve to the lady the benefit of the covenant, notwithstanding her death in his lifetime ; whether in fact he might not by will have done for her, dying without issue, what the Wills Act would have done for her if she had left issue. I do not know, whether this point was suggested in argument before the Court of Common Pleas, but I do not feel such confidence in the Plaintiff, as to make it proper to send the case a second time to law ;"—and he confirmed the certificate, and dismissed the bill with costs. Now that case differs from the present in the all-important ingredient, that the daughter died without issue, so that the case did not come within the thirty-third section. But I think it is impossible to read the passage I have quoted from the judgment, without feeling satisfied, that in the opinion of Sir *J. Wigram*, if the daughter had left issue which survived the testator, the Plaintiff, as her representative, would have been entitled to the benefit of the covenant. The argument in the Common Pleas is reported in 9 C. B. 1, but unfortunately the reasons of the judges for their certificate are not given. The argument before the Court of Common Pleas turned in some degree on the question, whether if a covenant is in the disjunctive, *i.e.* to do one or other of two things at the option of the covenantor, and one has become impossible by the act of God, the covenantor is or is not discharged from the performance of the other. I notice this point, because in the present case it may perhaps be suggested, that as the father's agreement was at the time of making it capable of being performed in one or other of two modes, namely, either by will or by dying intestate, this is disjunctive, and at the option of the father to do either ; and as the latter has been rendered impossible by the death of the daughter

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(i.e. the act of God), the father is discharged from performing the agreement in the other mode, namely, by will, according to the proposition laid down by Lord *Coke*, in *Laughter's Case* (a): "That where the condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part." That this proposition is too broadly laid down by Lord *Coke* is evident, not only from a careful consideration of the circumstances of the case itself, but from subsequent decisions. In *Anon.* (b), the condition of a bond was to make to the obligee a lease for life of certain premises by such a day, or pay him 100*l.* The obligee died before the day, and it was adjudged that his executor should have the 100*l.* *per Treby*, C. J., and the ground of *Laughter's Case* was denied to be universal. In *Studholme v. Mandell* (c), the Court said, that the rule and reason of *Laughter's Case* ought not to be taken so largely as *Coke* has reported it, but according to the nature of the case; and *Treby*, C. J., cited the *Anon. Case* (d) above mentioned, and added that in that case *St. John*, C. J., declared that he knew well some of the judges who gave the resolution in *Laughter's Case*, and they denied that they had laid down such a rule as *Coke* has reported. Yet the whole Court held, that the principal case of *Laughter* was good law. In *Da Costa v. Davies* (e), the Court of Common Pleas held, that where the condition of a bond is to do one of two things, showing that one could not be performed, is no good reason for not having performed the other. It appears to me, that it is impossible to lay down any uni-

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| (a) Co. Rep. pt. 5, plac. | (c) 1 Stra. 279. |
| 22. | (d) Salk. 170. |
| (b) 1 Salk. 170. | (e) 1 Bos. & Pul. 242. |

versal proposition either way, but that the principle to be applied in each case is, that it must depend on the intention of the parties to the bond or covenant or agreement, such intention to be collected from the nature and circumstances of the transaction, and the terms of the instrument. And this, at least, I think will hardly admit of contradiction, that if the Court is satisfied, that the clear intention of the parties was, that one of them should do a certain thing, but he is allowed at his option to do it in one or other of two modes, and one of those modes becomes impossible by the act of God, he is bound to perform it in the other mode. Now here it was manifestly the intention of the parties, that in one way or other the daughter should have an equal share of the testator's property; and if the testator was prevented by the act of God from performing his obligation in one way, he was bound to perform it in the other way, which *was* possible.

If, therefore, there be an alternative condition or covenant, I think that the testator is not absolved from performing his agreement, merely because the death of his daughter made its performance impossible in one of the modes. And I am of opinion, that so far as the demurrer is founded on the Statute of Frauds, and the second ground, it cannot be maintained.

[On the other and minor ground, whether the personal representative of the daughter was not a necessary party, his Honor reserved the point, and, on a subsequent day, held that the daughter's representative must be a party. The demurrer was therefore allowed, with liberty to amend the bill; but as the demurrer was overruled in the material points, it was allowed without costs.]

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1857 :
10, 11, 12
and 18 Feb.

*Company.
Powers.*

CLARKE v. THE ROYAL PANOPTICON.

THIS was a motion to dissolve an injunction granted in the long vacation, restraining the mortgagees of the property of the Panopticon from selling under their powers of sale. The Panopticon was constituted under a royal charter and a deed of settlement made pursuant to the charter. The charter gave authority to a general meeting (to be held under the terms of the deed of settlement) to empower the council to sell or mortgage, and generally to deal with the property as they should think fit. The charter and deed of settlement directed that no sale or mortgage should be made by the council without the authority of a general meeting.

The charter and deed of a company gave to a general meeting power to authorize the council to sell or mortgage. The council, in pursuance of a direction of a general meeting, received authority to mortgage. They made a mortgage with a power of sale. Held, that they had no authority to give a power of sale. Discussion of the powers of trustees having a special power.

The facts were rather complicated, but the result of them, so far as is material, may be stated thus:—That a general meeting was regularly called, for (among other objects) taking into consideration the propriety of raising a sum of 25,000*l.*; and of that object special notice was regularly given.

At that general meeting the council was empowered to raise that sum by mortgage; nothing was said in the authority given by the general meeting about giving to the mortgagee a power of sale.

The council treated with the Defendants, the mortgagees, and arranged with them for a mortgage; and the council prepared and affixed the corporate seal to a mort-

*Not followed.
Chancery
8 L.R. Eq. 569*

gage to the Defendants of real and personal estate of the Society, *with a power of sale.*

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The Plaintiff *Clarke* was himself managing director and a shareholder; he was present at the general meeting authorizing the council to mortgage, and also at the meeting of council when the resolution was passed authorizing the mortgage with a power of sale.

Mr. *Baily* and Mr. *C. Hall*, for the mortgagees.

They contended, on the question of the validity of the power of sale, that the power to make a mortgage, which it was admitted was well exercised, included authority to give a power of sale; there was no restriction in either the charter or the deed on giving a power of sale. The restriction was that no sale or mortgage should be made without the assent of a general meeting. That implied that a sale or mortgage might be made by a general meeting, and a general meeting had authorized the mortgage. So that it comes to this, does authority to make a mortgage imply authority to give a power of sale? Now without a power of sale a mortgage is incomplete; a power of sale is now universal according to the practice of conveyancers; no mortgagee will advance money without it. It would have been idle therefore for the general meeting to give power to make a mortgage without its consequential essentials.

They argued also, that the Plaintiff had acquiesced in the terms of the mortgage, and therefore they could not at least insist on the invalidity of the power of sale. The question of acquiescence turned on facts, and involved nothing affecting any general principles of law. It has therefore not been thought useful to report at any length that part of the case.

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Mr. *T. H. Terrell* and Mr. *Stiffe*, for the Plaintiff, the managing director, and certain of the proprietors.

No authority is given to give a power of sale; there is not any direct power either to sell or mortgage. There is a negative power,—*no* sale or mortgage is to be made *without* the authority of a general meeting. Clearly, therefore, unless a general meeting authorized it, there could be no sale. All that the general meeting has authorized is a mortgage. If that is to be held to include a sale, the effect is that power to sell is to be given without the authority of a general meeting.

The council could not delegate a power to sell, even if they had themselves a power to sell. The argument on the other side must go, in fact, this length—that if you give trustees a power to mortgage, but no power to sell, they may create, in a mortgage, a power which they do not possess themselves. There is no authority for that; and it would be a monstrous doctrine. It is said a mortgage is not complete without a power of sale. It is true the mortgagee's position is not so convenient; but the Court affords him the means of realising his security. It is not the universal practice to give a power of sale; it is no doubt a general practice at this day; but it is a practice of very modern growth, and cannot even now be said to be universal.

Mr. *Baily* replied.

The VICE-CHANCELLOR :

Judgment.

This motion raises two questions; the first, whether it was competent to the mortgagors to give a power of sale; secondly, if it was not, whether the party seeking relief against the exercise of a power of sale is not pre-

cluded by concurrence or acquiescence from obtaining relief.

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As to the first question, it is remarkable that there should be so little of authority as there is upon the point. It appears to me, however, that there are certain clear principles well established, by reasoning from which a conclusion may be drawn; and I think that conclusion ought to be, that it was not competent to the council to give a power of sale. The principles are these:—It is clear beyond doubt, that, though a special power to sell, given to trustees, may authorize a mortgage, yet a power to mortgage merely to trustees does not comprise a power to sell. That proposition is beyond doubt. Another general proposition is this:—If there is a special power to trustees, involving an exercise of personal judgment by the trustees, it is not competent to them to delegate that power to another person. There are many authorities in support of this proposition, but it is too clear to require a reference to authorities.

Now let us take these two propositions and see what is the legitimate conclusion to be drawn from them. Take, first, the second proposition, that it is not competent to a trustee, with a special power involving discretion, to delegate the exercise of it.

If there be a special power to a trustee to sell, that involves the exercise of discretion in the trustee. In selling there must be an exercise of discretion in the trustee, as to whether he shall sell or not, as to the time when, and the circumstances under which he shall sell. If then, as a matter of course, a trustee with such a power, coupled with a discretion, cannot delegate the exercise of his discretion, how can a trustee, who has

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not in himself even any power to sell, give authority to another to sell?

Let it be looked at as a simple question of reason and common sense. The principle is that a special power to mortgage does not comprise a power to sell. If so, a trustee with a special power to mortgage cannot himself sell. But if, as is contended, a power to mortgage comprises, as an incident, power to give authority to sell, then it would follow, that a trustee, who has power to mortgage, has a power to sell, or, at least, he can delegate to another a power to sell. Looking at the question in this point of view, it seems really almost too clear for argument.

It is said, that the practice of conveyancers is to treat a power of sale as a *necessary incident* to a mortgage; to introduce it universally. Now I must say to that argument and that proposition, I demur. I cannot admit the *universality* of the practice. I admit that it is much more frequent than it used to be thirty or forty years ago. But it is by no means an *universal* practice; and many mortgages may be seen at this day, in which no power of sale is introduced. But assume that a power of sale has become an ordinary incident to a mortgage, where the mortgagor is not a trustee. Let us consider how that would operate with regard to a trustee. He is to have, it is said, authority to give a power of sale. What power of sale? To whom? Is he to be enabled to give a power of sale to the mortgagee only, or to the mortgagee, his heirs and assigns? That would indeed be startling; that a trustee, without any power of sale in himself, should be able not only to delegate a power of sale to a mortgagee in whom he may have personal confidence, but to other persons who must be perfect

strangers to him. But, further, if he can give a power at all, on what terms is he to give it? On what terms with regard to notice? Is any notice to be requisite? Is the power to be exercised after *any* failure, in respect of either interest or capital, or only in respect of capital? What in fact is the extent of the power which is said to be incident to a mortgage?

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Then it has been argued, that unless a power to mortgage includes authority to give a power of sale, it would be injurious to the *cestuis que trustent*, because, it is said, it may be impossible to find a mortgagee to advance money without a power of sale, and, at any rate, it cannot be obtained on equally advantageous terms; and that it is for the advantage of the *cestuis que trustent* that the trustee should have such a power, in order that he may do whatever a prudent owner would do. I think the argument is fallacious; that it goes too far; for it assumes that a trustee may generally do what a prudent owner would do. Now it is clear that a trustee has not, generally, any such authority. A prudent owner may deal with his property in various ways, in which, if they were adopted by a trustee, it would be clearly a breach of trust.

I have further to observe, with reference to the argument, that it is universal of late years to insert in a mortgage a power of sale, that it is much less important that such a power should be inserted since the act of the 15 & 16 Vict. c. 86. For by the 48th section of that act, great powers are given to a mortgagee for obtaining a sale, which render the insertion of a power of sale much less material now than it used to be.

On the whole I adhere to the view which I took when



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the matter came before me in the vacation, that a special power to a trustee to mortgage does not give him authority to sell; and, *à fortiori*, does not give him a right to give to another person power to sell.

[The mortgage comprised principally real estate; but it included also certain chattels; a valuable organ and other pure chattels. The Vice-Chancellor observed, that all he had said referred only to the mortgage of the real estate; as to the personal chattels, there could be no mortgage of them but by a bill of sale; and with respect to the chattels, he should hold that the mortgagees had a right to sell.

[His Honor then referred to the terms of the charter, and of the deed, and said, there was no doubt that under the charter, a general meeting could give the council a power to sell or mortgage, or to do in fact as they pleased; that the deed followed the charter, and contained nothing to alter its effect in that respect. His Honor then went into the facts of the case as to acquiescence or concurrence, and held that, upon those facts, the Plaintiff had concurred in the making and form of the mortgage, and was by that concurrence precluded from disputing the validity of the power of sale; and, therefore, the injunction was dissolved with costs.]

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26th February  
and  
2nd March.

*Separate use.*

MOORE v. MORRIS.

**T**HIS cause came on upon motion for decree, as to the Defendant *David Morris*; and upon demurrer, as to the Defendant *Emily Morris*.

It turned ultimately upon two clauses in the will of *Thomas Morris* (made in 1845), who gave a part of his real estate to his sister "*Jane Davidson*, the wife of Captain *Henry Davidson*, her heirs and assigns for ever, *independent of the said Captain H. Davidson, for her separate use and benefit*, with power by any deed or instrument in writing, or by his last will and testament, to give, devise or dispose of the same to any person or persons she might think proper, either absolutely, conditionally or otherwise; and in default of her making any such gift or disposition, then, from and after her decease, the said part or share, or such part thereof as she should not have disposed of, should go to her heirs for ever."

And he gave as to personal property, "all his personal estate of what nature or kind whatsoever, and wheresoever situate and being (except such parts thereof as he had thereinbefore specifically bequeathed), unto his wife *Emily Morris*, and his sister *Jane Davidson*, and their respective executors, administrators and assigns, equally to be divided between them, share and share alike; the share of his sister *Jane Davidson* to be *for her sole and separate use, independent of the said Henry Davidson her husband*, and not to be subject to his debts, control or

Real estate devised to *A.*, the wife of *B.*, her heirs and assigns for ever, *independent of B., for her separate use and benefit*, with power to appoint, and in default remainder over.

Personal estate to *A.* for her sole and separate use, independent of her husband *B.*, and her receipts alone to be sufficient discharges. Held, that the limitations to the separate use of *A.* did not extend beyond the husband specifically named.

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interference ; and her receipt alone to be a sufficient discharge to his executors for the same."

Captain *Davidson* died in 1842. In August, 1850, Mrs. *Davidson* married *John R. Moore* the Plaintiff; previously to the marriage, a settlement was made, upon which, however, no question turned. In 1854, Mrs. *Moore* made a will. In 1855, Mr. *Morris*, the testator, died; and on the 9th May, 1856, Mrs. *Moore* died, leaving her husband surviving; and he claimed, in this suit, the personalty and the arrear of rents of the realty bequeathed and devised to Mrs. *Moore*, on the footing of the separate use limited to her being only during her first coverture. The Plaintiff had obtained administration to his deceased wife. The Defendant *David Morris*, who had obtained probate of his will, claimed under it, on the footing of the limitation to her separate use operating during her second coverture; and the decision upon that question disposed of others which arose, if the Court should hold the separate use clause to affect the second marriage.

Mr. *Swanston* and Mr. *M'Naghten*, for the Plaintiff.

The limitation to the separate use of Mrs. *Moore* is confined to the particular husband designated. No intention is expressed to exclude any other husband, either in the clause in question, or in any other part of the will. Here there is not an express separate use *for life*, but only separate use during the *life of the actual husband*; and there is no decided case, in which it has been held, that the separate estate endured beyond the life of the existing husband, except where the limitation to the separate use has been either expressly, or by irresistible implication, for *the life of the wife*: *Tullett v. Arm-*

*strong (a), Barton v. Briscoe (b), Woodmeston v. Walker (c), Beable v. Dodd (d), Re Gaffee (e), Horseman v. Abbey (f).*

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Mr. *Baily* and Mr. *Walford*, for *David Morris*, claiming under the will of Mrs. *Moore*.

As to the real estate, the absolute interest is given, and given to Mrs. *Moore's* separate use; whatever the duration of the estate, the duration of the fetter of separate use must be the same.

As to the personal estate, there also the entire interest is given; it is to be to Mrs. *Moore* for her sole and separate use; that is a distinct absolute gift. Where are the words to cut it down? The words applicable to the particular husband do not do so. The restriction is not part of the sentence creating the gift, so as to cut it down; but the restriction and the gift are co-extensive: *Gaffee's Case*.

Mr. *Glasse* and Mr. *Springald Thomson*, for *Emily Morris*.

Mr. *Swanston* in reply.

The VICE-CHANCELLOR:

The first question, and indeed the only material question, as I understand that the decision upon that will, in

Judgment.

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| (a) 1 Beav. 1.        | (e) 7 Hare, 101 and 1 |
| (b) Jac. 603.         | M'N. & Gor. 541.      |
| (c) 2 Russ. & M. 197. | (f) 1 Jac. & W. 381.  |
| (d) 1 T. Rep. 193.    |                       |

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fact, dispose of everything, is whether under the will of *Thomas Morris*, giving real estate and personal estate to the separate use of Mrs. *Moore*, formerly Mrs. *Davidson*, with power to make a will in respect of the real estate, the separate limitations of the estate are carried beyond the limitations during the life of Captain *Davidson*, the husband at the date of *Thomas Morris's* will. The facts on this part of the case are not in controversy.

Mrs. *Moore* was married to Captain *Davidson* in 1822; and in 1841, while that coverture still subsisted, *T. Morris* made his will. In 1850, Mrs. *Davidson* married the Plaintiff, and on the occasion of that marriage a settlement was made, on the limitations of which no question arises. The marriage having taken place, and no child of it being born, in 1854 Mrs. *Moore* made her will. After she had made her will, in July, 1855, her brother *Thomas Morris*, who had made his will in 1845, died, and in the June of the following year, Mrs. *Moore* died.

*David Morris*, the surviving brother of Mrs. *Moore*, obtained probate of her will; and afterwards administration to his estate was obtained by the Plaintiff.

Now with regard to the first question, whether the separate use limited by the will of *T. Morris*, as to both the real and personal estate, was intended by him to extend beyond the life of the first husband; whether in fact it was intended to exclude the marital rights of that husband only, or of any future husband, that must turn of course on the construction of the will of *Thomas Morris*. First, as to the real estate, the limitation does

not in express terms say anything about a life estate ; the testator meant that the lady should have the fee ; but whatever he meant to give her, he describes in clear terms, that he intended it to be her's independently of her husband Captain *Davidson*.

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I hardly know what language could be found to express more distinctly that it was intended that what was given was to be independent of that particular husband. The testator gives it in terms free and independent of *that particular husband* ; and if I were to decide that by the words used it was meant, that if ever Mrs. *Davidson* should marry again, the gift should be for her separate use, independent of any subsequent husband, I should be overthrowing the whole principle on which the doctrine of separate use stands. The *jus mariti* is not to be curtailed by ambiguous terms, but by clear and unanswerable expression of intention. Here, all that the testator expresses is, that whatever he has given is to be to the separate use of the donee, independent of that particular husband. And it may be, that he had special reasons for making this lady independent of that particular husband. He may have had personal objections to that particular individual exercising the *jus mariti* ; but, however that may be, he at any rate expresses no more. I do not see the smallest indication of intention to carry the limitation to her separate use beyond the existing coverture. It is urged that in the same sentence there are the words giving Mrs. *Davidson* power to dispose of the property. Now we know that though you may give real estate to a married woman, that gift does not of itself carry with it power to dispose of it either by deed or by will ; and a power to a married woman to dispose by deed or will of a fee-simple limited

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to her separate use, though it may be convenient, is not necessarily connected with the limitation to her separate use. It may or may not be attached to it, and I cannot, from the fact of such a power being annexed to the limitation, infer that there was any intention to carry on the clause of separate use beyond the particular coverture designated.

Next as to the personal estate—[His Honor referred to the words of the clause and proceeded.]

There is here first an absolute gift to Mrs. *Davidson*, and then it goes on to say that it shall be to her separate use, independently of the particular husband. Now, here it must first be observed, there is no special power to dispose of the property by deed or will, and why? because an absolute gift of *personalty* to the separate use of a married woman gives her power to deal with it independently of her husband, either by deed or will, which is not the case with respect to the fee-simple of real estate; it includes a power to make a will, and therefore naturally the draughtsman did not insert a power of disposition, for the reason that during the coverture she had the power, notwithstanding the coverture. If she survived her husband she would be free from all restraint; and then, if she afterwards married a second husband, without having disposed of or fettered her estate, what is there to carry on the separate use to the second marriage? The words are the same as those used with respect to the separate use of the real estate. The property is to her separate use independently of *that husband*; and it appears to me that the limitation to her separate use is restricted to her coverture with that particular husband.

The only words on which a substantive argument can be founded are these, which are in fact part of the same sentence—"and her receipt alone to be," and from which it was argued that the gift to her separate use was to be during her whole life. But I do not think it was at all the idea of the testator that the limitation to Mrs. *Davidson's* separate use should endure for her life.

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It appears, therefore, to me, that, subject to *Gaffee's* case, I should feel no doubt; and I do not feel any doubt suggested by the course taken in that case; on the contrary, that case appears to me rather to strengthen my view. [His Honor then stated the nature of *Gaffee's* case, and proceeded.] The property there was settled so as not to go by way of anticipation; during the wife's life there was a restriction on anticipation. Now when there is a restriction on anticipation in the case of a *feme sole*, we know that unless there is a limitation over, it operates nothing. But in the case of a married woman it can only exist at all by being connected with an estate to her separate use. If the restriction on anticipation is intended to last for her life, it can only do so by the separate use being also limited for her life. [His Honor then referred to the Lord Chancellor's judgment in that case, and observed that his Lordship's argument was, that the estate was intended to be of equal duration with her life; that there was no gift or direction except to pay to her from time to time without power of anticipation, which could not be for life, unless the clause of separate use and the clause against anticipation were connected so as to apply to the whole life: and then continued.] If I had here words of the same character, I should come to the same conclusion; but here the language is quite different. We have here first a clear and express gift of the whole interest, and we have not the ingredient



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of there being no gift, except in a direction to pay to the married woman without power of anticipation.

It appears to me, on the whole, that the limitation to the separate use of Mrs. *Moore* did not extend beyond the life of Captain *Davidson*. The effect is, that as he died before his wife, there was nothing to carry on the separate use to her second marriage; and the *jus mariti* attached on the second marriage.

May 23rd.

June 6th.

Succession duty.  
Statutes.

#### WILCOX v. SMITH.

Devise in 1826 to his son *A.* for life, remainder to his son's first and other sons in tail. *A.* died in 1827, leaving his son the tenant for life.

The tenant for life died on the 18th of July, 1853,

leaving *B.*, his eldest son, surviving, who was born before the 19th May, 1853.

The succession duties act was passed on the 4th August, 1853, but came into operation on the 19th May.


THE object of this Petition was to obtain payment of the duty, which had become payable to the Crown in respect of the succession of the Plaintiff, *Charles Wilcox*, in the suit of *Wilcox v. Brown*, to certain real estates at *Wolston Brandon* and *Stretton-upon-Domsmore*, in the county of *Warwick*, under the disposition thereof made by the will of his late grandfather *William Wilcox*, the testator in the pleadings mentioned.

The Petition stated as follows:—

The said testator, *William Wilcox*, being seised of the real estates aforesaid, duly made and published his last will and testament in writing, dated the 3rd day of June, 1826, and thereby after confirming the jointure settled on his wife, the above-named Defendant *Anne Wilcox*, by her marriage settlement, and directing payment of his debts and funeral expenses, and disposing of his per-

Held, that *B.* was within the act, and succession duty attached.

sonal estates as therein mentioned, and appointing certain property, over which he had a power of disposition among his children, in favour of his two daughters, the above-named Defendants *Mary Ann Wilcox* and *Christian Wilcox*, and the heirs of their respective bodies respectively issuing, and devising certain lands at *Moreton Morrell*, in the said county of *Warwick*, to his son *John Wilcox*, his heirs and assigns for ever, and giving his said wife a life interest in a certain messuage or tenement at *Brandon*, in the parish of *Wolston*, in the said county of *Warwick*, the said testator proceeded in the following terms: "I give and devise all other my messuages, tenements, or dwelling-houses, buildings, farms, tithes, hereditaments and premises situate, lying and being at *Brandon* aforesaid, and at *Wolston* and *Stretton-upon-Dunsmore*, in the said county of *Warwick*, with their and every of their appurtenances, except the advowson and right of patronage and presentation to the church at *Wolston*, and unto my said trustees *Richard Smith*, *William Wale Brown* and *Thomas Brown*, their heirs and assigns, to the uses, upon the trusts, and for the ends, intents and purposes hereinafter expressed and declared concerning the same, that is to say, upon trust to receive the rents, issues and profits thereof, and to pay so much thereof as they in their discretion shall think proper, not exceeding the sum of 150*l.* per annum, for and towards the clothing, maintenance and education, and in the support of my said son, *William Wilcox*, until he shall attain the age of twenty-five years; and from and immediately after his attaining that age to the use of my said son *William Wilcox* and his assigns during the term of his natural life, without impeachment of or for any manner of waste, other than destruction, wilful and malicious waste; and from and after the determination of that estate by forfeiture, or otherwise, in


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his lifetime, to the use of my said trustees and their heirs during the natural life of my said son, *William Wilcox*, and in trust to preserve and support the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall require ; but nevertheless to permit and suffer my said son, *William Wilcox*, and his assigns, to receive and take the rents and profits of the same hereditaments for his and their own use during his life ; and from and immediately after his decease, whether he shall depart this life before he shall have attained the age of twenty-five years or afterwards, to the use of the first son of the body of my said son, *William Wilcox*, lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing ; and for default of such issue to the use of the second, third, fourth, fifth and all and every other the son and sons of the body of my said son, *William Wilcox*, lawfully to be begotten severally, successively and in remainder one after another, as they shall severally be in priority of births, and the heirs male of the body and bodies of all and every such son and sons issuing, the elder of such sons and the heirs male of his and their body and bodies issuing being always to be preferred and to take before the younger of such sons and son and the heirs male of his and their bodies issuing ; with divers remainders over for the benefit of the testator's other son, the said *John Wilcox*, and his two daughters, the said *Mary Ann Wilcox* and *Christian Wilcox*, successively, and their first and other sons in tail ; with an ultimate limitation to the use of the testator's own right heirs for ever."

3. The testator died in the month of May, 1827, without having in any way altered or revoked the disposition of his property made by his will except by a codicil,

which does not in any way affect the before stated devise of his real estates at *Wolston Brandon* and *Stretton-upon-Dunsmore* aforesaid, and he left his son, the said *William Wilcox*, his heir at law him surviving; and the said will and codicil were afterwards duly proved by the said *Richard Smith*, *William Wall Brown* and *Thomas Brown*, the executors therein named.

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4. The estates so devised to the said Plaintiff *William Wilcox* for life, with remainder to his sons in tail male as aforesaid, and which are hereinafter referred to as the said settled estates, consist of several messuages or tenements, and 1,100 acres of land or thereabouts, situate at *Brandon Wolston* and *Stretton-upon-Dunsmore* as aforesaid, of the yearly value of 3,000*l.* and upwards.

5. The original suit was instituted on the 23rd day of July, 1827, for the administration of the said testator's real and personal estate, and by the decree made therein on the 4th day of August following, the usual accounts were directed to be taken of his debts and funeral and testamentary expenses, and the rents and profits of his real estate; and it was ordered, that some proper person should be appointed receiver thereof, with the usual directions in that behalf.

6. The Rev. *John Brown*, of *Trinity College, Cambridge*, clerk, was appointed the receiver of the rents and profits of the said real estates in pursuance of the said decree, and various other proceedings were from time to time had in the said suit, and, ultimately, by an order made thereon on the 25th day of June, 1847, it was ordered that the said receiver should let the said Plaintiff *William Wilcox* into possession of the said settled


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estates, he having then obtained a vested interest therein ; and it was also ordered, that the dividends to accrue due on a certain sum of 839*l.* 9*s.* 4*d.* Bank £3 per Cent. Annuities, standing in the name of the Accountant-General of this Court, upon trust, "*Ex parte* The *London and Birmingham* Railway Company, the Account of *William Wilcox's* Trustees," should from time to time be paid to the said Plaintiff *William Wilcox* until further order.

7. The said Plaintiff *William Wilcox* died on the 18th day of July, 1853, leaving the above-named *Charles Walford Wilcox*, his eldest son and heir-at-law, him surviving, who, upon his father's death, succeeded to the said settled estates as tenant in tail under the disposition thereof by the said testator's will as before stated, and also to the said sum of 839*l.* 9*s.* 4*d.* Bank £3 per Cent. Annuities standing in the name of the Accountant-General upon trust as before mentioned.

8. By the decree made in the secondly above-mentioned suit, on the 2nd day of January, 1854, it was ordered, that the decree made in the original cause dated the 4th day of August, 1847, and the order on further directions made therein, and all other orders and proceedings made and had therein, as far as the same respectively relate to the said settled estates, should be carried on and prosecuted between the parties to that suit, in like manner as by the said decree and orders respectively was directed between the parties to the said original suit ; and it was ordered, that a proper person should be appointed to be a receiver of the rents and profits of the said settled estates ; and, on the 24th day of January, 1854, an order was obtained by or on behalf of the said *Charles Walford Wilcox*, for reviving

the said original suit, and the same now stands revived accordingly.


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9. By an order of this Court, made on the 13th day of July, 1854, *John Calvert Blanshard* was appointed to be a receiver of the rents and profits of the said estates.

10. By the act of parliament in force at the time of the death of the said Plaintiff *William Wilcox*, and from thence to the present time, with respect to the duties payable on successions to real and personal property, there was and is payable to her Majesty in respect of the succession of the said Plaintiff *Charles Walford Wilcox* to the said settled estates, under the disposition thereof made by the will of the said testator *William Wilcox*, as before stated, according to the value thereof, to be ascertained in the manner directed by the said act, a duty at the rate of 1l. per cent. upon such value, payable by eight equal half-yearly instalments, the first whereof ought to have been paid at the expiration of twelve months next after the said *Charles Walford Wilcox* became entitled to the beneficial enjoyment of the said settled estates, but no part of such duty has hitherto been paid, and six of such instalments have now become due.

The Petition prayed as follows:—

1. That the amount of duty payable to Her Majesty in respect of the succession of the said *Charles Walford Wilcox* to the said settled estates at *Wolston Brandon* and *Stretton-upon-Dunsmore* in the pleadings mentioned, under the disposition thereof made by the will of the said testator *William Wilcox* as aforesaid, may be ascertained, and that provision may be made by this Court

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for the payment thereof to the Receiver-General of Inland Revenue, on behalf of her Majesty, out of the said settled estates, or the rents and profits thereof, or otherwise, as to this Honourable Court shall seem fit, and that all proper directions may be given in that behalf.

2. Provision for the payment of the costs.

The *Attorney-General*, Mr. *Hanson* and Mr. *Thring*, for the Petitioner.

The act was intended to apply to every description of property devolving from one person to another upon death, and was intended to be applicable to existing settlements as well as future settlements.

The act is directed to come into operation on the 19th May, 1853 (54th sect.), though it did not pass till the 4th August, 1853; as to that interval of time therefore it is retrospective. The act treats tenants in fee, for the purposes of duty, as tenants for life: the duty attaches when they come into possession; and as to tenants in tail, the duty is assessed upon them as for an annuity of the value of their life interest.

The immediate case before you is this: a settlement in 1826. *A.*, tenant for life, remainder to *B.* in tail. *A.* dies after the 19th May, 1853. We say that then is the time when *B.* succeeds to the *succession* within the meaning of the act. The other side say he was *entitled* at the date of the settlement or at the date of his birth, and therefore that there was no succession after the act.

The second section of the act, in the first branch, is the only one applicable, as this is a case of dispo-

sition, not of devolution by law; "past disposition" in it means any disposition before the commencement of the act; "future disposition" any disposition after that period.

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Now the argument on the other side is, that the remainderman having become entitled on the making of the settlement cannot again become entitled on the death of the tenant for life, and is not therefore within the act. But the words "has or shall become" are applicable to both a past disposition and a future disposition, and the words "beneficially entitled" relate as well to a right in possession as to a right in expectancy. The clause applies strictly to this case. Mr. *C. W. Wilcox* became entitled in remainder on his birth; he has become entitled in possession on the death of the tenant for life. But suppose the words only meant first becoming entitled, then Mr. *Wilcox* became entitled in remainder on his birth; but still the statute, which directs that the tax shall be levied when the party comes into possession, would include him.


The intent of the statute is abundantly explained by subsequent sections. [They commented on the 3rd and 4th sections, as supporting the view taken.]

Then the 5th section expressly includes this very case. Here the extinction of the life of the tenant for life gives an increase of benefit to the remainderman, which is expressly made a succession by this 5th section. [They referred also to the 7th, 12th, 15th, 20th, 21st, 41st, 44th and 45th sections.]

Mr. *Glasse* and Mr. *Reilly*, for the Respondent.

1st. These acts must be construed strictly: if there is a doubt, the Respondent must have the benefit of it:



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*Hubbard v. Johnstone* (a); *Re Beresford* (b). Then is not this statute on the point before you very ambiguous? Its general scope is this: it imposes the duty on the *acquisition* of the beneficial interest, not on the becoming entitled in possession. The *payment* of the duty attaches on the possession; but the liability attaches on the acquisition of the title. (20th sect.)

You observe the words "beneficially entitled" in the first branch of the second section, relating to dispositions, and in "possession or expectancy" in the second, relating to devolutions. Now when did Mr. *Wilcox* become "beneficially entitled?" Clearly on his birth, living his father. He became beneficially entitled to the whole, *corpus* and income; in remainder, it is true; not to the enjoyment of either *corpus* or income; but he had *title* to the whole. How then can it be said that he became *entitled* on the death of his father, when the *title* was full from the date of his birth?

[They commented also on the 7th section and the other sections relied on by the Crown (c).]

The following cases were also cited: *Re Micklethwait* (d), *Willon v. Colvin* (e), *Henderson v. Kennicott* (f), *Hoare v. Hornby* (g), *Hobson v. Neale* (h), *Re Cornwallis* (i).

(a) 3 Taunt. 177; see p. 220.

(b) 5 Irish Com. L. Rep. p. 409.

(c) The arguments on both sides were too elaborate to be reported at any length: I have only reported the heads and principal of those argu-

ments, as all their substantial points are noticed in the judgment.

(d) 11 Exch. 452.

(e) 3 Drew. 617.

(f) 2 De G. & Sm. 492.

(g) 2 Y. & Coll. C. C. 121.

(h) 17 Beav. 178.

(i) 11 Exch. 580.

The VICE-CHANCELLOR :

[His Honor stated the prayer of the petition and the facts.]

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The question is, whether succession duty is payable. Now it is unquestionably a principle established in reference to acts of parliament of this kind imposing duties, that they must be construed strictly, and that, if the act is ambiguous, the subject is entitled to the benefit of the doubt; but the principle is, not that the subject is to have that benefit if, upon any argument that the ingenuity of Counsel can suggest, the act does not appear perfectly accurate; but that if, after careful examination of all the clauses, a judicial mind shall entertain any reasonable doubt as to what the legislature intended, then the subject shall have the benefit of the doubt.

The act on which this question turns is the 16th and 17th *Vict.* cap. 51. The act was passed on the 4th of August, 1853; but by the 54th section it is to be taken to come into operation on the 19th of May of the same year. The general frame of the act is to this effect: the second section and several subsequent sections are to this effect,—that the acquisition of any interest in property in certain cases and under certain circumstances specified, is to be held to constitute what is technically expressed in the act by the word “succession;” and then, by the tenth section, every succession is made liable to duty.

The question is, whether *Charles Walford Wilcox* acquired his interest in such way and under such circumstances as to constitute a succession.

Now the principal section to be considered is the second; and that section consists of two branches, the

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first relating to cases arising on the *disposition* of property; the second relating to cases arising on *devolution* by act of law. It is not necessary to consider the second branch, as this is a case of *disposition*, not *devolution*.


Then taking the first branch, it is as follows: "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of the act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation . . . . . shall be deemed," &c.

Now it may be first useful to clear away some doubts which have been suggested, by stating what I conceive to be the sense in which certain words and expressions in this clause are intended to be used. As to the words "past or future disposition," it appears to me that "past" means previously to the passing of the act: "future" means subsequently to the passing of the act; that is, the period when the act actually was passed, though it is to take effect sooner. It is suggested that the word "past" means previously to the passing of the act, not however at any remote period, but only at some time between the commencement of the taking effect of the act and the date of its passing. That would be a limitation of the meaning of the word, and unless I find strong grounds in the whole act to induce me to conclude that such a limitation was intended, I ought not to import it; and I see no such grounds.

So the words "has or shall" refer to the same period.

Then there is the word "entitled." According to its

ordinary sense, that means having some right or title; but the words are "become entitled." What is the effect of the word "become?" The ordinary construction, and I think its correct construction, is, according to *Johnson's* definition, "to enter into some state or condition by a change from some other;" becoming entitled means, therefore, entering into the state of being entitled from the state of not being entitled. In other words, to "become entitled" means to *acquire* a right or title. In *Blythe v. Granville* (a), the Vice-Chancellor of *England* correctly I think observed, that the words "become entitled" mean "become entitled either in possession or in reversion;" and certainly a remainderman does, on the death of the tenant for life, become entitled to the estate in possession, as a change of condition from being entitled in remainder.

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Then, "beneficially" means of course for his own benefit, in contradistinction to being entitled as a trustee; there is no contention about that.

Then we come to the words, "on the death of any person dying after the time appointed for the commencement of the Act;" what does that mean? Suppose a devise to *A.* for life, remainder to *B.* in fee; on the death of the testator, *B.* certainly becomes entitled to the estate expectant on the death of a person, an event which has not yet happened. That is one sense in which the words may be used; but they may mean, becoming entitled in possession by reason of a death which has actually happened. So that there certainly is ambiguity as to which of the modes of becoming entitled is intended.

(a) 13 Sim. p. 195.

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Then there are the words "after the time appointed for the commencement of the Act." The only time that can, I think, be referred to under those words, is the time when the act came into operation.

Those are the expressions in the act on which it is convenient that I should express my opinion as to the sense in which they may be used.

Now it is contended by the Respondent that, inasmuch as *C. W. Wilcox* was born at a period between the death of the testator and the time when the Act came into operation, on his birth he became entitled as remainderman, and that therefore that was the time when he "became entitled:" and that is perfectly true in one sense; but he did not become entitled in possession, till the death of his father, which happened between the time of the commencement of the act and its passing; and it is argued, that as he became entitled on his birth, he could not become again entitled on the death of the tenant for life, and, therefore, that he is not within the operation of the Act.

On the other hand, it is contended for the Crown, that the words "have or shall become entitled" mean become entitled to an estate expectant on the death of a person. Now, it is clear, that there is a considerable ambiguity on that point, in the 2nd section; and I confess, that although I think what was meant, was becoming entitled in any way whatever, still the scheme of the Act seems to be this, to affect persons having become entitled in interest, though not in possession; and there are several sections which speak of it in that light. [His Honor then referred to the 20th section, which enacts that "the duty imposed by this Act shall be paid at the time when the

successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof."]

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Now, in one sense in which the words may be used, *C. W. Wilcox* comes within them; he has become beneficially entitled in possession, on the death of the tenant for life. Suppose the words in the 2nd section had been "become entitled expectant on the death of any person." At the time of the passing of this Act, *C. W. Wilcox* had so become entitled. But then I am putting in the word "expectant," and it is justly observed, that that word is not to be interpolated, because, if you look at other sections of the Act, you find that the word "expectant" is specifically used when it is intended. [His Honor referred to the 14th and 15th sections.]

It comes finally to this :—On the one hand, it is said, that *C. W. Wilcox* is not chargeable, because he became entitled, not to the possession, but to the estate in remainder, not on the death of another person. On the other hand, that he is, because he did become entitled in one sense, that is in possession, on the death of another person.

Now, if the Respondent's construction is correct, we should have this very inconsistent result. Suppose the testator to make his will and die after the passing of the Act, and by it devise to *A.* for life, remainder to *A.*'s first and other sons in tail. Suppose *A.* at the time of the testator's death had a son; immediately on the testator's death *A.* would become entitled in possession, and the son would be entitled in remainder, and then clearly the son would have become entitled "on the death of a person." But suppose exactly the same case in all re-

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spects except in this,—that there was no son of *A.* born at the death of the testator, but a son was afterwards born, that son would not have become entitled on the death of any person, neither on the death of the testator, nor on the death of his father; so that if that is to be the construction where even every thing has taken place after the Act, the question, whether the son would be chargeable, would depend on whether he was born before or after the death of the testator. Anything more improbable or inconvenient can hardly be conceived. Still if this question before me rested entirely on the 2nd section, and on the effect of the words “become entitled,” I should be of opinion that there is considerable doubt whether this case would come within it. But it is unnecessary to decide it on that point, because it must be observed that the 2nd section is a string of alternatives, that is of phrases and words connected by the disjunctive “or.” And it is competent to any person claiming under an Act so worded, to select any one of the alternatives. The words are, “by reason whereof any person has or shall become entitled to any property; or the income thereof.” And the Counsel for the Crown has a right to read it—“by reason whereof any person has or shall have become entitled to the income thereof;” and if, taking it that way, the case is within the section, it is within it altogether. The Petitioner may take every part separately; he may take separately the part “has become entitled to the income on the death,” &c. Now when did *C. W. Wilcox* become entitled to the income? Certainly not till and on the death of his father. It appears therefore to me that, taking the two alternatives, whether the case comes within the first or not, it comes at least within this second alternative; and unless I see something in the context of the Act, to show that it was not intended to come within that part of the 2nd section, I am bound to hold that it is within it.

Having carefully considered other sections, the result on my mind is this, that there are several sections from which you must infer the very contrary, viz. that this case was contemplated. There are several other sections by which certain other cases are clearly within the Act; cases of such a nature that, being within the Act, it is impossible to suppose that the legislature meant to include those cases, and not to include this.

[His Honor referred to the 3rd section, observing:] It seems to me there is considerable analogy between that case and this; and it is impossible to suppose that the legislature intended to take in that case, and not to take in this. Then the 5th clause says, "Where any property shall, at or after the time appointed for the commencement of this Act, be subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or persons upon the extinction of such charge, estate or interest, shall be deemed to be a succession accruing to that person, or the persons, if more than one, then entitled beneficially to the property, or the income thereof, according to his or their respective interest or interests therein or beneficial enjoyment thereof." An obvious illustration of the case here contemplated would be this:—Suppose at the time of the commencement of the Act an estate had descended on an eldest son as heir-at-law, but the testator left a widow entitled to dower; and suppose the dower actually set out by metes and bounds; then the heir-at-law would be at the time of the commencement of the Act actual owner at law, subject only to the dower; then the widow dies. That clearly would be a case within the 5th section; and it is utterly inconceivable that there should be an intention to embrace that

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of 500,000*l.*, was at the time of her death invested in the public funds and in other securities in *England*.

2. The said *Jane Innes*, being so domiciled in *Scotland* as aforesaid, duly made a testamentary trust disposition of her heritable and moveable, real and personal estate, dated the 7th day of March, 1832, and the same was duly executed in the manner required by the law of *Scotland* for passing heritable and moveable estate by way of testament, and was in the words and figures following, that is to say, —

“ I, Miss *Jane Innes*, residing in *Picardy Place, Edinburgh*, now only surviving child of the deceased *George Innes, Esq.*, last of *Stow*, cashier of the Royal Bank of *Scotland*, and some time deputy receiver-general of land rents for *Scotland*, and sister and heir apparent and executrix of the deceased *Gilbert Innes, Esq.*, last of *Stow*, being desirous of settling the succession to and disposal of my heritable and moveable estate after my decease, and having full confidence in the persons under named for executing the trust herein confided to them, do therefore to the same effect, as if I were feudally vested in the whole estate after conveyed, and then as now, and now as then, hereby give, grant, dis-  
p-  
pone, assign, convey, transfer and make over to and in favour of Lieutenant-Colonel *George Scott*, residing at *Malleny, John Thomson*, esquire, cashier of the Royal Bank of *Scotland*, and *Hugh Watson*, of *Torsonce*, writer to the signet, and the acceptors or acceptor, survivors or survivor of the acceptors or acceptor, and to such other person or persons as he or they may assume to act along with him or them, in virtue of the powers after conferred to that effect, in trust for the purposes after mentioned, the majority of the surviving acceptors at the

time, whether originally named or assumed, being hereby declared to constitute a quorum, all and whole my heritable and moveable, real and personal estate of every description and denomination, without any exception, and wherever situated, presently pertaining, or that may pertain or belong to me in any manner of way at the time of my decease, and specially and without prejudice to the said generality, all heritable or moveable, real or personal estate, whether now fully vested in me, or to which I may have any way, right as heir apparent or nearest in kin to my said father or brother, or in any other manner of way whatever, with the whole titles, writs, vouchers and instructions of my said estate, dispensing with the generality hereof, and declaring these presents to be equally valid and effectual, as if my whole estate, heritable and moveable, real and personal, were herein specially conveyed. And I hereby bind and oblige me, my heirs and successors, to infest and seise the said *George Scott, John Thomson* and *Hugh Watson*, and the acceptors or acceptor, survivors or survivor of them, and such person or persons as may be assumed, into the trust in virtue of the powers hereinafter conferred on them in my whole heritable estate requiring infestment, and that by two several infestments, and manners of holding one thereof, to be holden of me and my heirs for payment of a penny, *Scots* money, if asked only, and the other of said infestments to be holden from me and my foresaids of and under our immediate lawful superiors thereof, in the same way as I held or may hold the same myself, and for that purpose I oblige myself and my foresaids to grant, subscribe and deliver all writs, deeds and conveyances containing procuratories of resignation and precept of sasine and all other clauses necessary for fully vesting and establishing in the persons of my said disponees my said whole estate, with all other deeds that may be need-

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ful by the laws of any foreign country, where any part of my said estate may be situated, to the effect of vesting my said disponees therein, and I convey and assign to my said disponees, all general conveyances, unexecuted procuratories of resignation, and precepts of sasine and retours of general service to which I in any way have right, with full power to do everything thereanent that I could do myself. And I hereby nominate my said disponees above named, or to be assumed as before and after mentioned, to be my sole executors and universal intromiters with my moveable or personal estate, excluding all others from the said office. Farther I empower my said disponees above named, and the survivors and survivor of them or majority of them for the time being, when and as often as they or he shall think expedient, to nominate and appoint by a writing under their or his hands any person or persons they shall judge proper to be a trustee or trustees for the purposes herein mentioned along with him or them, or after his or their decease declaring, that the person or persons so to be appointed shall have the same powers in every respect as the said disponees or trustees named by myself possess, and, particularly, that of naming and assuming others as trustees in the same manner as above provided. And I hereby empower my said trust disponees, original or assumed, to name factor and agents for managing the trust estate, either from their own number or others, with suitable allowances for trouble, declaring, that my said trustees before named, or assumed, shall not be liable for omissions, nor for each other, nor for any factor or overseer to be appointed by them, but each for his own actual intromissions only, and declaring that my said trust disponees named or assumed shall have the most ample powers of management and disposal of my said whole estate, heritable and moveable, as fully as I myself or any other unlimited pro-

prietor or possessor thereof could possess, in particular that of selling and disposing thereof, either by private bargain or public roup, and that at such prices and on such conditions as they may think fit to grant dispositions, assignations and other conveyances thereof to purchasers, containing all clauses needful, and, in particular, binding my heirs universally, in absolute warrandice of such sale or sales, and declaring, that no purchaser or purchasers from them shall have any concern with the purposes of this trust, or with the application of the price or prices to be paid by him or them, but shall be fully exonerated by the simple discharge of my said trustees, or their quorum for the time, and also to compound, transact, and finally settle all questions and claims, whether at my instance or against me, in any way they think proper. As also I empower my said trustees above-named or assumed, to set leases of any parts of my heritage, at such rents and for such period of years as they think proper, and to invest the proceeds of any part of my estate in any manner of way they think proper. But declaring always, as it is hereby expressly provided and declared, that these present are granted in trust always, and under the condition, that my disponees above named or assumed shall hold, dispose, convey, pay and make over, my said whole estate heritable and moveable, real and personal, in such manner of way, and to and in favour of such person or persons, and for such ends and purposes, as I may appoint and direct by any writing or writings under my hand, even although executed on death-bed, and however informal, if clearly indicative of my intention, and declaring, that any settlement, latter will, or other deed or deeds of a testamentary nature, already executed by me, shall not be held as hereby recalled, unless in so far as the same may be inconsistent with any separate directions or writings hereafter to be exe-

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cuted by me. But declaring, that if any person or persons would draw any bequests by virtue of said writing executed by me after the date hereof, and also by any former settlement or testamentary deed already executed by me, such bequest hereafter made by me shall be held to supersede all former provisions in favour of the same individual; and declaring, that failing any disposal of my said estate by a writing or writings now or hereafter to be executed by me in manner above mentioned, and also failing any prior settlement, will or other testamentary deed executed by me, my said trust disponees herein named or assumed shall hold my said whole heritable and moveable estate for behoof of and shall accordingly dispoise, assign and make over the same to my nearest heirs and executors whomsoever; but I hereby reserve not only my life rent of the whole estate herein conveyed, but also full power to cancel, alter or revoke these presents in whole or in part, as I may think fit, declaring, nevertheless, that these presents, so far as not revoked or altered, and any separate writing or writings executed or to be executed by me, relative to the disposal of my said estate as above mentioned, shall be valid and effectual deeds, although found in my repositories, or in the custody of any person to whom I must entrust the same undelivered at the time of my death, with the delivery whereof I have dispensed and hereby dispense for ever. And I consent to the registration hereof in the books of council and session, or others competent for preservation, and, if necessary, for execution, and constitute *John Hope*, Esq., advocate, my procurator for that purpose. In witness whereof these presents, written upon this and the two preceding pages of stamped paper by *William Wallace*, clerk to the said *Hugh Watson*, are subscribed by me at *Edinburgh*, the 7th day of *March* in the year 1832,

before these witnesses the said *William Wallace* above designed, and *Thomas Mackie* my servant. (Signed) *Jane Innes*. *William Wallace*, witness, *Thomas Mackie*, witness."

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3. The said *Hugh Watson* died in the lifetime of the testatrix.

4. The testatrix used to keep a book known as a "jotting book," and she was in the habit of entering in the said book notes or memoranda of all such matters as she considered of interest either to herself or her family, and the said book contained various directions to her said executors and trustees, relative to the disposition of her trust estate, and also much valuable information relative to her pedigree, and to the respective rights of the various persons claiming or who might claim to be of her kindred or family, and she used to keep such jotting book in the drawer of one of the tables in the drawing room of her house in *Picardy Place* aforesaid, and such book was found in the said drawer after the death of the testatrix, by the Defendant *John Thomson*, and the last-named Defendant and also the Defendant *William Mitchell Innes* were aware of the existence of the said jotting book, and of the nature and effect of the contents thereof, and such contents would have afforded great assistance to her said executors and trustees in the execution of the trusts reposed in them by the testatrix, and the said book ought to have been made use of, and the said notes, memoranda, directions and other information ought to have been acted upon by the said executors and trustees in the execution of the trusts aforesaid.

5. The testatrix had never made any testamentary

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disposition or settlement prior to the said trust disposition herein stated, and she died on the 2nd of December, 1839, without having revoked or in any manner altered the said trust disposition, save in so far as the same was altered or otherwise modified by the directions contained in the said jotting book of the testatrix; and the said trust disposition was duly recorded in the books of council and session, at the instance of the said *John Hope*, Esq., on the 11th of the same month of December, and was duly proved by the said *George Scott* and *John Thomson*, the surviving executors thereof, on the 20th of the same month of December, in the Prerogative Court of the Archbishop of *Canterbury*.

6. The personal estate of the testatrix consisted, amongst other things, of the several sums of money and stock following; that is to say, 150,000*l.* Bank £3 per Cent. Consolidated Annuities; 150,000*l.* £3 per Cent. Reduced Annuities; 200,000*l.* New £3:10*s.* per Cent. Annuities; 13,300*l.* like Annuities; 80,000*l.* £3:10*s.* per Cent. Reduced Annuities; 50,000*l.* like Annuities; 100*l.* Long Annuities; 6,250*l.* Bank of England Stock; 11,000*l.* India Stock, and 14,606*l.* 8*s.* 3*d.* Stock of the Equivalent Company.

7. The effect of the said trust disposition hereinbefore stated was, save in so far as the same was altered or otherwise modified by the directions contained in the said jotting book of the testatrix, and subject to such directions, to vest the beneficial interest in the whole of the heritable estate of the said testatrix in her heir-at-law, and the beneficial interest in the whole of her personal or moveable estate in her nearest of kin at the time of her death, according to the law of *Scotland*.

8. The Plaintiff *John Innes* is the eldest son and heir-at-law of *John Innes*, late of *Newent* aforesaid, who died on the 4th of June, 1814, and who was in his lifetime the eldest son and heir-at-law of *John Innes*, formerly of *Longhope*, in the said county of *Gloucester*, who died on the 25th day of December, 1792, and who was in his lifetime the only son and heir-at-law of *William Innes*, first of *Barnyards*, in the county of *Aberdeen*, *North Britain*, and afterwards of *Longhope* aforesaid, who died in the year 1760, and who was in his lifetime the eldest son and heir-at-law of *Gilbert Innes*, formerly of *Barnyards* aforesaid, and afterwards of *Todholehills*, and afterwards of *Rora*, and afterwards of *Darrahill*, all in the said county of *Aberdeen*, hereinafter called *Gilbert Innes*, of *Rora*, who died on the 29th of May, 1755, and the said Plaintiff *John Innes* is in manner aforesaid the heir-at-law and sole real representative and nearest heir of line of the said *William Innes* and of *Gilbert Innes* of *Rora*, according to the law of *Scotland*.

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9. The said *Gilbert Innes*, of *Rora*, had issue five sons and two daughters and no more, namely, the said *William Innes*, his eldest son and heir-at-law as aforesaid, *George Innes*, *Alexander Innes*, *Thomas Innes*, *Gilbert Innes*, *Isobel Innes* and *Mary Innes*. The said *George Innes* had issue five children and no more, namely, *Marion Innes*, *Allan Innes*, *Jane Innes* the testatrix, *David Innes* and *Gilbert Innes*, hereinafter called *Gilbert Innes* the younger. The said *Alexander Innes*, *Thomas Innes* and *Gilbert Innes*, the uncles of the testatrix, and the said *Allan Innes*, *David Innes*, *Gilbert Innes* the younger, and *Marion Innes*, the brothers and sister of the testatrix, had all died at the date of the death of the testatrix, without having left any lawful issue, and the Plaintiff *John Innes* is so as afore-

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said the great-grandson and heir-at-law of the said *William Innes*, the eldest paternal uncle of the testatrix, and the Plaintiff *John Innes* was at the time of the death of the testatrix, and is now, the heir-at-law and nearest and lawful heir of line, both in special and in general, of the said testatrix according to the law of *Scotland*.

10. The Plaintiff *Richard Innes* is one of the sons of *Richard Innes*, late of *Longhope* aforesaid, who died on the 23rd of April, 1817, and who was in his lifetime the brother of the said *John Innes*, father of the Plaintiff *John Innes*, and the Plaintiffs were at the death of the testatrix, and now are, two of her nearest of kin according to the law of *Scotland*, and they sufficiently represent such nearest of kin for the purposes of this suit.

11. The Defendant *Alexander Mitchell* claims to be the heir-at-law of the testatrix, and the Defendant *William Mitchell*, calling himself *William Mitchell Innes*, claims to be her sole next of kin, and they endeavour to make out such heirships and nearness of kin respectively in manner hereinafter appearing.

It then stated the alleged pedigree of the Defendants *A. Mitchell* and *W. M. Innes*.

13. Immediately after the record and proof of the trust disposition and will of the testatrix, the said sums of 150,000*l.*, 150,000*l.*, 200,000*l.*, 13,300*l.*, 80,000*l.*, 50,000*l.*, 6,250*l.*, 11,000*l.* and 14,606*l.* 8*s.* 3*d.* respectively, and the said sum of 100*l.* Long Annuities, were, upon the application of the Defendant *William Mitchell Innes*, transferred by the said executors into the name of the said Defendant, and the same, or the greater part thereof, still

are or is standing in the name of the said Defendant, or of the Defendant *Alexander Mitchell*, in the books of the Governor and Company of the Bank of *England*, and the whole of the rest of the personal estate of the testatrix was converted into money by her executors, and was upon such application as aforesaid paid over to the Defendant *William Mitchell Innes* by the said executors in the said month of December, 1839, and the Defendants *Alexander Mitchell* and *William Mitchell Innes*, or one of them, have or has ever since retained possession of the same, and the last-named Defendant on behalf of himself and the Defendant *Alexander Mitchell* refuses to account for the same or to pay over the same or any part thereof to the Plaintiffs as such next of kin of the testatrix as aforesaid, although he has been frequently applied to for that purpose.

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14. On the 20th of January, 1840, at a Court held before the Sheriff Substitute for the shire of *Edinburgh*, the Defendant *Alexander Mitchell* was (upon the application of the Defendant *William Mitchell Innes*, his tutor in law, and according to the form required by the law of *Scotland* in such cases) served nearest and lawful heir of line in special and in general to the said *Jane Innes* the testatrix (called in the record of the said service, his paternal grandfather's maternal grandmother's brother's daughter), no person appearing to dispute his claim to such service.

15. Immediately after the Defendant *Alexander Mitchell* was so served heir to the testatrix as aforesaid, the said executors and trustees permitted him or the Defendant *William Mitchell Innes*, as such tutor in law as aforesaid, to enter into possession of all the heri-

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table estate of the testatrix, and the said Defendants, or one of them, have or has ever since continued, and the Defendant *Alexander Mitchell* now is, in possession of the same, and he refuses to give up the same to the Plaintiff *John Innes*, as such heir at law as aforesaid, although he has frequently been applied to for that purpose.

16. The Defendant *Alexander Mitchell* has received various sums of money out of the proceeds of the estate of the testatrix, and has invested the same in the purchase of government funds and other securities, and of lands, tenements and hereditaments in *England* or *Wales*,—and so it would appear if the Defendants would set forth what sums of stock or government or other annuities or other securities are now standing in the name or names of the Defendant *Alexander Mitchell*, or any person or persons in trust for him, in the books of the Governor and Company of the Bank of *England*, or in the books of the Honorable *East India* Company, and if they would set forth of or to what lands, tenements or hereditaments in *England* or *Wales*, and for what estate or interest, or respective estates or interests, the Defendant *Alexander Mitchell*, or any person or persons in trust for him, is or are now seised or entitled, and the full particulars of the same stock and securities, lands, tenements and hereditaments respectively, and where and when and under what circumstances, and by whom, acting on behalf of the Defendant *Alexander Mitchell*, every such sum of stock, and every such other security as aforesaid, and all such lands, tenements and hereditaments as aforesaid were respectively purchased by or on behalf of the Defendant *Alexander Mitchell*, and what was the nature and amount of the consideration given by the Defendant *Alexander Mitchell*, or on his

behalf, on the occasion of every such purchase, and how and from what sources every such consideration was procured by or for the said Defendant, and, if any part of any such consideration consisted of money, then if they would set forth when and how and from what sources such money and every part thereof was obtained by or for the said Defendant, and if any part of such money was obtained by means of a loan or loans, then if they would set forth whether any and what security for the repayment of such loan or loans respectively was given by the said Defendant, or any other or what person on his behalf or otherwise, and whether any and what part of the same has ever, and when, been since repaid by the said Defendant or any other person, and generally if they would set forth the nature and full particulars of every such purchase respectively.

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17. The Defendant *William Mitchell Innes*, on behalf of himself and of the Defendant *Alexander Mitchell*, paid the sum of 10,000*l.* to the Defendant *John Thomson*, and the sum of 5,000*l.* to the said *George Scott*, and various sums amounting in the whole to the sum of 5,000*l.* to various members of the family of the said *George Scott* immediately after the real and personal estate of the testatrix had been as aforesaid transferred to the Defendants *Alexander Mitchell* and *William Mitchell Innes*.

18. The Defendant *Alexander Mitchell* was served such heir as aforesaid, and the Defendants *Alexander Mitchell* and *William Mitchell Innes* were put into possession of the real and personal, heritable and moveable estate of the testatrix as aforesaid immediately after the death of the testatrix, without any regard having been had to the said notes, memoranda, directions or other

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information contained in the said jotting book of the testatrix or any of them, and although the Defendant *John Thompson* and the said *George Scott* well knew or had good reason to believe that the Defendants *Alexander Mitchell* and *William Mitchell Innes* were not respectively such heir at law and next of kin of the testatrix as aforesaid, and without any notice of the death of the testatrix, or of the purport or effect of her said trust disposition having been given to the Plaintiffs or either of them, or to any other person who was or might have been properly interested in opposing the respective claims of the Defendants *Alexander Mitchell* and *William Mitchell Innes* to be such heir at law and next of kin of the testatrix respectively as aforesaid, and before the Plaintiffs or either of them, or any other person interested in opposing the claims of the said Defendants, or either of them, had become acquainted with the fact of the death of the testatrix, or with the provisions of her said trust disposition; and the Defendant *Alexander Mitchell* was served such heir as aforesaid without the knowledge of the Plaintiff *John Innes*, or of any other person interested in opposing his claim to be so served heir; and the said executors so transferred the real and personal estate of the testatrix to the Defendants *Alexander Mitchell* and *William Mitchell Innes* as aforesaid in collusion with the Defendants *William Mitchell Innes* and *Alexander Mitchell*, and without having made any inquiry or taken any other measures to discover who were or was respectively the next of kin or heir at law of the testatrix, and without having inserted any advertisement or other sufficient notice of the death of the testatrix, or of the record and proof of her said trust disposition, or of the provisions thereof, in the *London* or *Edinburgh Gazette*, or in any other newspaper in common circulation in *England* or *Scotland*, or having taken

any other precautions to secure the due execution of the trusts contained in the said trust disposition of the testatrix, and they so acted in order that the Defendants *Alexander Mitchell* and *William Mitchell Innes* might obtain and keep possession of the said heritable and moveable real and personal estate without any proper investigation of the evidence produced in support of their respective claims to be respectively such heir at law and next of kin of the testatrix as aforesaid, and in order to defraud the person or persons really entitled to the said real and personal estate respectively, although they well knew or had good reason to believe that the Defendant *Alexander Mitchell* was not the heir at law of the testatrix, and that the Defendant *William Mitchell Innes* was not one of her next of kin, and that the said Defendants were not really entitled to the said real and personal estate of the testatrix or any part thereof respectively.

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19. The Defendants pretend that the said two sums of 10,000*l.* and 5,000*l.*, respectively so given to the Defendant *John Thomson* and to the said *George Scott* respectively, and the said sums of money so given to the family of the said *George Scott* as aforesaid, were so given respectively as a compensation for the trouble which the said executors or trustees had experienced in executing the trusts contained in the will of the testatrix : whereas the Plaintiffs charge the contrary of such pretence to be true, and that the said sums were respectively so given as aforesaid in pursuance of an agreement fraudulently entered into between the said executors and the Defendants *Alexander Mitchell* and *William Mitchell Innes*, and in consideration of the said executors having so transferred the whole of the heritable and moveable property of the testatrix to the Defendants *Alexander*

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Mitchell and *William Mitchell Innes* without any proper investigation of their respective claims to be entitled thereto, and without having given any notice to any person or persons who might be entitled to or claim an interest therein respectively as aforesaid, and without having taken any other such precautions as were required for the due execution of the trusts reposed in them by the testatrix,—and so it would appear if the Defendants would set forth, &c. &c.

20. The said *George Scott* died in the year 1846, having previously duly made his last will and testament, whereby he appointed the Defendant *Jane Cunningham*, otherwise *Scott*, his sole executrix, and the said will was duly proved by the said executrix on the 7th of March, 1846, in the proper Court for that purpose in *Scotland*.

21. At the time when the Defendant *Alexander Mitchell* was so served heir to the testatrix as aforesaid, he or the Defendant *William Mitchell Innes*, as such tutor in law as aforesaid, on his behalf produced to the Court, as evidence in support of his said claim to be such heir as aforesaid, various documents, consisting, amongst other things, partly of various letters alleged to have been written and sent at various times by or to various members of the family of the testatrix, and to have been preserved by *Gilbert Innes* the younger, the brother of the testatrix, and partly of various deeds, paper writings and other documents purporting to relate to various occurrences which were alleged to have taken place in the family of the testatrix, and partly of various entries and other marks in certain books and on certain papers, which were alleged to have been made by various members of the said family; and, in particular, they so produced the letter hereinafter stated, which purports to

have been written in *Edinburgh*, on the 25th of March, 1722, by the said *George Innes*, the father of the testatrix, to his father *Gilbert Innes*, of *Rora*, and to have been addressed to the said *Gilbert Innes*, of *Rora*, and to have been sent by the said *George Innes* to *Rora* on the said 25th of March, 1722; and they also so produced as aforesaid a book, which purported to be a memorandum book, and which was distinguished when so produced as aforesaid by the number 129, and which contained the entries hereinafter stated, some of which entries purport to have been made in the said book by the said *George Innes*, and the remainder of which entries purport to have been made in the said book by *Gilbert Innes* the younger.

It then set out the letter of the 25th day of March, 1722, and the entries contained in the memorandum book hereinbefore mentioned, and then alleged:—

24. The Defendants *Alexander Mitchell* and *William Mitchell Innes* pretend that the said letters and other documents were genuine productions, and that they were found after the death of the testatrix by *James Robert Gardiner*, esq., the uncle of the Defendant *Alexander Mitchell*, partly in a house in *Picardy Place* aforesaid, where the testatrix used to reside, and partly in a house in *Saint Andrew's Square, Edinburgh*, belonging to the testatrix; and they pretend that the said letters and other documents, and the said entries, were in reality respectively written at the times at which, and by the several persons by whom they respectively purport to have been written, and that the said letters were in reality respectively sent to the several persons to whom they respectively purport to have been sent, and in particular that the said letter hereinbefore stated was written and sent by the said *George Innes* to the said *Gilbert Innes*, of *Rora*, on the said 25th of

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March, 1722, and that the entries in the said memorandum book last hereinbefore stated were in reality respectively made and written by the said *George Innes* and *Gilbert Innes* the younger respectively: whereas the Plaintiffs charge the contrary of such pretences to be true, and that the said letters and other documents and the said entries or some of them were entirely fictitious, and that they or some of them were respectively written long after the times at which they respectively purport to have been written, and after the death of the said *Gilbert Innes* the younger, and were fraudulently procured by the Defendants *Alexander Mitchell* and *William Mitchell Innes* in order to establish their respective claims to be such heir at law and next of kin of the testatrix as aforesaid, and in particular that the letter hereinbefore stated which purports to have been written on the 25th of March, 1722, and the entries in the said memorandum book hereinbefore stated which purport to have been made and written by the said *George Innes* and *Gilbert Innes* the younger as aforesaid, were respectively written long after the dates at which they so respectively purport to have been written as aforesaid, and that the said letter and the said entries were fraudulently procured and made by the Defendants *Alexander Mitchell* and *William Mitchell Innes* for the purpose of making it appear that the said *William Innes*, the ancestor of the Plaintiffs, had died without leaving lawful issue, as alleged by the Defendants *Alexander Mitchell* and *William Mitchell Innes* contrary to the fact,—and so it would appear if the Defendants would set forth when and where and how and by whom and in whose presence and at whose request such hereinbefore stated letter, and the entries in the said memorandum book hereinbefore stated, were really written respectively, and when and where and by whom and in what particular condition and in

what bundles or other packets, and how numbered and arranged, the said letters and other documents, and the said books containing the entries aforesaid, and each of them, and in particular the hereinbefore stated letter and the said memorandum book containing the entries hereinbefore stated, were and was found or first seen after the death of the testatrix, and what writings, indorsements or other marks there were upon the said letters or other documents or upon the said books, or any of them, and what were the words and figures, and what was the purport and effect of each of the said entries respectively, and, in particular, what writings, indorsements or other marks there were upon the hereinbefore stated letter or upon the said book containing the entries hereinbefore stated at the time when they were so found or first seen respectively as aforesaid, and what writings, indorsements or other marks have been since made upon the letters or other documents, or upon the said books or any of them, and in particular upon the hereinbefore stated letter, and upon the said book containing the entries hereinbefore stated or either of them, and when and where, and how and by whom, and in whose presence and at whose request, every such writing, indorsement or other mark was so made, and what persons had access to the said letters or other documents or to the said books or any of them, and in particular to the hereinbefore stated letter, or to the book containing the entries hereinbefore stated, after they were respectively so found or first seen as aforesaid, and before they were so produced to the Court as aforesaid, and what became of the said letters and other documents and of the said books and each of them, and in particular of the hereinbefore stated letter, and of the book containing the entries hereinbefore stated, during the interval which elapsed between the death of the testatrix and the time

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when the Defendant *Alexander Mitchell* was so served heir as aforesaid, and if they would set forth in what particular condition, and in what bundles or other packets, and how numbered and arranged, such letters and other documents and such books and each of them, and, in particular, the hereinbefore stated letter, and the book containing the entries hereinbefore stated, were and was respectively at the time when the Defendant *Alexander Mitchell* was so served heir as aforesaid, and where and in whose custody the same respectively have been ever since and are now.

25. Immediately after the death of *Gilbert Innes* the younger, which took place in the month of February, 1832, the Defendant *William Mitchell Innes* obtained an entrance to the said house in Saint Andrew's Square, where *Gilbert Innes* the younger used to reside, and he continued in possession thereof without the knowledge of the testatrix up to the time of her death; and he provided false keys of the upper rooms of the said house, in which rooms the papers belonging to *Gilbert Innes* the younger used to be kept and then were, and he thereby obtained clandestine access to the said papers, and he secretly burnt and otherwise destroyed large quantities of the said papers and fraudulently substituted others in their place, and he so acted in order to suppress evidence which would have shown that he was not one of the next of kin of the testatrix or of *Gilbert Innes* the younger, and to make it appear, contrary to the fact, that he was so as aforesaid entitled as such next of kin as aforesaid to the whole of the personal estate of the testatrix.

26. At the time when the Defendant *Alexander Mitchell* was so served heir to the testatrix as aforesaid, he, or the Defendant *William Innes Mitchell* on his behalf,

also produced to the Court as evidence, in support of his claim to be such heir as aforesaid, various documents and paper writings purporting to be extracts from the register books of baptisms, marriages and burials in various parishes in *Scotland*, and referring, as the said Defendants pretend, to various members of the family of the testatrix; and the said Defendants allege that such extracts were genuine productions, and that the entries in the said register books from which the said extracts purported to have been respectively taken were all in reality respectively made at the times at which they purport to have been made respectively, and that the various persons mentioned therein were all members of the families of the testatrix and of the Defendants *Alexander Mitchell* and *William Mitchell Innes* respectively, or of one of the said families, and that the said documents and paper writings afford conclusive proof that the Defendants *Alexander Mitchell* and *William Mitchell Innes* are respectively such heir at law and next of kin of the testatrix as aforesaid: whereas the Plaintiffs charge the contrary of such pretences to be true, and that the said extracts, or some of them, were fictitious productions, and that they were fraudulently procured by the Defendants *Alexander Mitchell* and *William Mitchell Innes* for the purpose of establishing their respective claims to be such heir at law and next of kin of the testatrix respectively as aforesaid contrary to the fact, and that the said documents and paper writings were not true copies respectively of the entries in the register books of which they purported to be copies respectively, and that even if they were true copies of the said entries, the same do not refer respectively to the persons to whom the said Defendants allege that they refer respectively, and that the same do not in reality establish the said respective

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claims of the said Defendants to be such heir at law and next of kin of the testatrix respectively as aforesaid.

27. In particular the said Defendants produced a paper writing purporting to be an extract from the register of burials in the churchyard of *Gray Friars* hereinbefore mentioned, and which paper writing was in the words and figures following (that is to say):—"March, 1722. *William Innes*, son to *Gilbert Innes*, in *Sunderhill*, aged 20 years. Died 25th and buried 26. Merks paid. South, the south-west syde of *Rosshall's* tomb."

28. The Defendants pretend that the said paper writing is a true extract from the said register of burials, and that it refers to the burial of the said *William Innes*, son of *Gilbert Innes*, of *Rora*, who was the ancestor of the Plaintiffs as aforesaid: whereas the Plaintiffs charge the contrary of such pretences to be true, and that the said paper writing is not a true copy of or extract from the said registrar, and that even if it were a true copy of or extract from such register, the same does not refer to the said *William Innes*, the ancestor of the Plaintiffs, nor to any son of *Gilbert Innes* of *Rora*, and they charge that the *Gilbert Innes* mentioned in the said register was not the same person as *Gilbert Innes* of *Rora*, and that the said paper writing was fraudulently produced by the Defendants *Alexander Mitchell* and *William Mitchell Innes*, for the purpose of making it appear, contrary to the fact, that the said *William Innes*, the ancestor of the Plaintiffs, had died in *Edinburgh* without leaving lawful issue, and that the hereinbefore stated letter was a genuine production, and was really written by the said *George Innes* at the time aforesaid, although they well knew that the said letter was fictitious and fraudulent as aforesaid.

29. The Defendant *William Mitchell Innes*, after the death of *Gilbert Innes* the younger and in the lifetime of the testatrix, and the Defendants *Alexander Mitchell* and *William Mitchell Innes*, after the death of the testatrix, secretly burnt and otherwise destroyed large quantities of papers and other documents belonging to *Gilbert Innes* the younger and the testatrix respectively, and in particular they so burnt or otherwise destroyed the jotting book of the testatrix hereinbefore mentioned and several valuable memoranda relating to the pedigree and connections of the *Innes* family, which were in the handwriting of *Gilbert Innes* the younger and of the testatrix respectively, and which had been deposited in the said house in Saint *Andrew's* Square, and the said Defendants so destroyed the said letters and other documents and the jotting book for the purpose of removing evidence of an important nature with reference to the pedigree and family of the testatrix which would, if produced, have proved, as the fact is, that the said Defendants are not, nor is either of them, in any way related to the testatrix or to the said *Gilbert Innes* of *Rora*, and that the Defendant *Alexander Mitchell* is not and that he never was the heir at law of the testatrix, and that the Defendant *William Mitchell Innes* is not one of the next of kin of the testatrix, and that the said Defendants are not, nor is either of them, entitled to the real or personal property of the testatrix nor any part thereof, and so it would appear if the Defendants would set forth a full and complete list of all the papers, letters and other documents which were so burnt or destroyed as aforesaid, stating when and where, and by whom, and in whose presence and by whose direction, order or advice, and for what reason and under what circumstances every such paper, letter or other document was so burnt or destroyed as aforesaid, and what was the date at

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which every such paper, letter or other document was written respectively, and what was the nature and what were the words and figures, purport and effect of every such paper, letter or other document respectively, and when, and where and by whom every such paper, letter or other document was written, and if they would set forth what were the contents of the said jotting book of the testatrix, and where and when, and by whom and under what circumstances the said jotting book was first seen after the death of the testatrix, and when, and where, and by whom, and in whose presence, and by whose direction, order or advice, and for what reason and under what circumstances such jotting book was so destroyed as aforesaid, and where and in whose custody the same had been kept from the time when it was first seen or found, after the death of the testatrix, until it was so destroyed.

30. All the letters and papers and other documents which were found by the Defendants in the said two houses of the testatrix, or either of them, and which were not so destroyed as aforesaid, were afterwards committed by the Defendants *Alexander Mitchell* and *William Mitchell Innes* to the custody of the said *Robert James Gardiner*, and were removed by the said *Robert James Gardiner* from *Scotland* to his chambers at *Somerset House* in the county of *Middlesex*, and they, or the greater part of them, remained in such chambers until they were removed back to *Scotland*, in pursuance of an order of the Court of Session made in the year 1851.

31. The Defendants allege that when the said letters, papers and other documents were so removed back to *Scotland* as aforesaid, it was then for the first time dis-

covered that a large number of them had been lost by *Robert James Gardiner*.

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32. By a writ of summons of proving the tenor of the said letters, papers and other documents in the Court of Session, obtained on the 29th of May, 1852, by the Defendant *Alexander Mitchell*, certain drafts and other papers, which were in the possession of the last-named Defendant, were raised into legal proof of the purport and effect of the said letters and papers and other documents, or some of them, in all Courts of justice in *Scotland*.

33. The said letters and papers and other documents were intentionally lost or destroyed by *Robert James Gardiner* at the request and by the direction of the Defendants *Alexander Mitchell* and *William Mitchell Innes*, and in pursuance of a plan which had been agreed upon by and between the said Defendants and *Robert James Gardiner* before the said letters and papers and other documents were removed from *Somerset House* as aforesaid; and they were so lost or destroyed in order that the Defendant *Alexander Mitchell* might be enabled to prove the tenor of the same as aforesaid, and in order that the signs and indications of fabrication and fraud, which were to be found amongst the said letters and papers and other documents so lost or destroyed as aforesaid, might be destroyed, and that the Defendants *Alexander Mitchell* and *William Mitchell Innes* might obtain all the advantages of the said frauds without incurring the same risk of detection which they would have incurred if the said letters and papers and other documents had not been lost,—and so it would appear if the Defendants would set forth when and where and by and between whom any conversation relative to the said

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letters and papers and other documents took place before the same were so delivered to *Robert James Gardiner* as aforesaid, and what was the true purport and effect of every such conversation, and in particular whether it was not agreed at such conversations, or some of them, that the said letters and papers and other documents so lost or destroyed as aforesaid should be so lost or destroyed by *Robert James Gardiner*, or some persons by his directions and connivance or on his behalf; and if they would set forth who was present at every such conversation, and whether any letters or other written communications took place between the said Defendants, or either of them, their or either of their solicitors or agents, and *Robert James Gardiner*, or any other and what person or persons, or between the said Defendants themselves, relative to the loss of the said letters and papers and other documents, and what was the date and what were the words and figures, purport and effect of every such communication, and where and by and to whom respectively every such communication was written and sent respectively; and if they would set forth a full, perfect and complete list of all the letters and papers and other documents which were lost or destroyed by *Robert James Gardiner*, or while the same were in his custody, stating the date and the true nature, purport and effect of every such letter and paper, or other document, and by and to whom respectively any such letter and paper or other document was written and sent respectively, distinguishing such of the same of which the tenor has been so proved as aforesaid from those of which the tenor has not been proved, and setting forth the true reason why the tenor of every such last-mentioned letter, paper and other document respectively has not been proved.

34. The Defendants *Alexander Mitchell* and *William*

Mitchell Innes have fraudulently mutilated, altered, and otherwise tampered with, the registers of baptisms, marriages and burials in various parishes in *Scotland*, and in particular in the parish of *Belhelvie*, in the county of *Aberdeen* aforesaid, and they have destroyed or otherwise made away with some of the register books aforesaid, and they have inserted into some of the said books various fictitious entries in order to support their respective claims to be such heir-at-law and next of kin of the testatrix as aforesaid, and they have altered the language of various entries in the said books in order to make it appear, contrary to the fact, that the said entries refer to various members of the families of the testatrix and of the said Defendants respectively, or of one of such families, and in order to make it appear, contrary to the fact, that the said alleged pedigree of the Defendants hereinbefore set forth is a true and accurate pedigree of the family of the said testatrix and of *Gilbert Innes of Rora*.

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35. The Plaintiffs, in the course of the year 1840, deposited with the late Sir *James Gibson Craig*, baronet, who was then acting as agent for the Defendants *Alexander Mitchell* and *William Mitchell Innes*, various books, papers and other documents which tended to establish the pedigree of the Plaintiffs, and contained other evidence essential to the successful prosecution of their rights as such heir at law and next of kin as aforesaid, the said Sir *James Gibson Craig* having requested to see the same under the pretence that he wished thereby to be enabled to judge of the validity of the claim made by the Plaintiffs to the property of the testatrix, and the Plaintiffs having consented to such request in order, if possible, to avoid the necessity of litigation.

36. The said Sir *James Gibson Craig* afterwards, on

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various pretexts, refused to return the said books, papers and other documents, and the Plaintiffs were unable to obtain possession of the same, or any of them, until the time hereinafter stated.

37. In the course of the year 1853, in consequence of the continued importunity of the Plaintiffs, a number of books and papers, which purported to be the said books, papers and other documents, were returned to the Plaintiffs by Messrs. *Gibson, Craig & Co.*, the present agents of the last-named Defendants.

38. The books and papers so returned to the Plaintiffs as herein stated consisted of part of the said books, papers and other documents so as aforesaid deposited by the Plaintiffs with the said Sir *James Gibson Craig*; but several of the said books, papers and other documents last mentioned were not so returned, and they have never been returned to the Plaintiffs; and the Plaintiffs are unable to obtain possession of the same, or to discover whether the same or any of them are now in existence, or whether or not they or any of them have been destroyed by the said Sir *James Gibson Craig*, or any other person by his order or on his behalf.

39. In particular the said books, papers and other documents so as aforesaid deposited by the Plaintiffs with the said Sir *James Gibson Craig* consisted, amongst other things, of an original letter dated in the year 1801, and written by *Gilbert Innes*, the younger, to *Richard Innes*, the father, by the Plaintiff *Richard Innes*, and directed to *Richard Innes, Linton, Gloucestershire*, which contained evidence very material to the Plaintiffs; but the said letter has not been returned to the Plaintiffs, or either of them, and the Plaintiffs are unable to

obtain possession of the same or to discover what has become thereof,

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40. Various conversations have taken place, and letters and written communications passed between the Defendants and their solicitors and agents in *Scotland* and elsewhere, and various other persons, and between the Defendants themselves, relative to the various matters and things aforesaid, or some of them, by which the truth of the matters aforesaid would appear.

41. The Defendants, their solicitors or agents, now have or lately had in their possession, custody or power, the various deeds, evidences and writings and drafts, copies and abstracts thereof, accounts, books of account, securities, letters, copies of letters, receipts, vouchers, memoranda and paper writings, which were found in the said two houses of the testatrix after her decease, and also divers deeds, evidences and writings, and draft copies and abstracts thereof, accounts, books of account, securities, letters, copies of letters, receipts, vouchers, memoranda and paper writings relating to the matters and things hereinbefore stated and charged, or whereby, if produced, the truth thereof would appear.

The Plaintiffs prayed as follows :—

1. That the personal estate of the said testatrix may be administered under the direction of this Honorable Court, and for that purpose directions may be given and accounts taken.

2. That an account may be taken of the real estate of the said testatrix, and of the rents and profits thereof received by the Defendant *Alexander Mitchell*, or any other person on his behalf, and also of the real estate

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and other property so purchased by the said Defendant out of the proceeds of the estate of the testatrix as aforesaid; and that the said Defendant may be declared to be a trustee thereof for the benefit of the Plaintiffs, or one of them, and may be charged with an occupation rent for such part of such real estate as shall appear to have been in his occupation for his own benefit.

3. That the clear residue of the personal estate of the testatrix and of the rents and profits of her real estate may be ascertained and secured for the parties respectively entitled thereto, and that for that purpose the rights and interests of all parties in such residue may be ascertained and declared.

4. That, if necessary, a receiver of the rents and profits of the real estate of the testatrix and of the rents and profits of the real estate so purchased by the Defendant *Alexander Mitchell* as aforesaid may be appointed.

5. That the Defendants *Alexander Mitchell*, *William Mitchell Innes* and *John Thomson* may respectively be restrained by the injunction of this Honorable Court from parting or otherwise dealing with the said real and personal estate of the testatrix, or any part thereof, without the leave of this Honorable Court.

6. That it may be declared that the Defendant *John Thomson* and the said *George Scott* were guilty of a breach of trust in transferring the real and personal estate of the testatrix to the Defendants *Alexander Mitchell* and *William Mitchell Innes* under the circumstances aforesaid; and that the Defendant *John Thomson* and the estate of the said *George Scott* may be rendered liable to make good to the parties respectively entitled

to the said real and personal estate respectively any deficiency in the same respectively which may eventually appear to have resulted from such breach of trust.

7. That the Defendants may pay the costs of this suit.

8. That the Plaintiffs may have such further or other relief as the nature of the case may require.

The *Attorney-General*, Mr. *Baily* and Mr. *Hobhouse* for the demurrer (a).

The arguments turned exclusively on the *Scotch* real estate and its rents.

The estate is treated by the bill as centered in *Alexander Mitchell*. The bill is not for recovering the estate by means of any *conveyance* to be made by any *third party*, or by *any act of any third party*. What it asserts is a *legal* title in the Plaintiff. You are not called upon to affect the *conscience* of any party, nor to direct any act; but to declare, on the allegations of this bill, that, as between the Plaintiff and the Defendant, the Plaintiff is the legal owner of an estate in *Scotland*.

And you are also called upon to determine that a fraud has been committed in a Court in *Scotland*, and to set aside the decree of that Court.

The bill is in effect an ejectment bill. Observe the

(a) The judgment proceeded exclusively on a minor point in the case. No opinion being, in the view taken by the Court, necessary on the more important questions argued,—of jurisdiction, and the effect of a judgment frau-

dulently obtained. But the arguments on those points appeared to the reporter so full of valuable and important learning, that he has considered it useful to the profession to record them.

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prayer of the bill. It prays, it is true, an account of rents; but that portion of the prayer stands on the foundation of the title to the estate; it is treated as an accessory to the principal thing; the title to the principal thing, the estate, is that which is sought by the bill.

The bill states, firstly, a trust disposition by the testatrix. Upon that it appears, according to the bill, that according to the Scotch law a judicial writ issues, under which judicial proceedings take place, and upon those the title of the heir is ascertained and determined. That is the manner of making a complete title, and after that proceeding only is the heir called properly heir, and at liberty to enter. [He then referred to the 14th 15th and 18th paragraphs.] Now these are allegations of fraud on the Court in *Scotland*.

The Defendant has entered, and has been in possession from January, 1840. There is no allegation throughout the bill, that any act remains to be done to give legal perfection to his title. So that it is simply a complainant coming to this Court to ask it to exercise its jurisdiction, to try a title to real estate in a foreign jurisdiction, against the existing owner, who has perfected his title, and has been in possession and enjoyment for more than sixteen years. This Court has never attempted to entertain such a jurisdiction.

A foreign jurisdiction can entertain nothing but a *personal* action; it cannot entertain *direct* jurisdiction in respect of land. It may entertain indirect jurisdiction, thus:—When there is a personal contract between parties, this Court will entertain cognizance of it (the Defendant being within the jurisdiction) though the contract may relate to real estate. If, being in *France*, I execute a

contract in *France*, to sell real estate in *Middlesex*, to an Englishman also in *France*, there I admit, that though the contract is executed in a foreign country, this Court will hold jurisdiction over it.

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But if in *France* an instrument is executed, being a perfect conveyance of real estate in *Scotland*, this Court would have no jurisdiction to try whether that is a proper conveyance in *Scotland*.

In this case there is nothing in the title of the Plaintiff of an executory character. If he has any title, it is a complete legal title; so that, if the subject-matter were in *England*, it would be a common case for ejectment; and the subject-matter being in *Scotland*, it must be tried by a Scotch tribunal: *Way v. Yally* (a).

The relation of the Plaintiff and Defendant here is not founded on personal contract. But the Plaintiff says he claims under a certain instrument, and that the Defendant claims under the same instrument, and has had his title ascertained and determined in *Scotland*. The Plaintiff's case is, that that determination was obtained by fraud. Now that is the statement of the case by the bill; and I say that these questions depend on *privity of estate*, not on *contract*. [He referred to *Mostyn v. Fabrigas* (b).]

That case shows the doctrine at Common Law; *à fortiori* must it be the doctrine in Equity, which only acts in *personam*.

[The learned Counsel then referred to *Pike v.*

(a) 2 Salk. 651.

(b) 1 Cowp. Q. B. 161.

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Hoare (a), Lord Baltimore's Case (b), Lord Kildare's Case (c), Lord Ardglass's Case (d), Carteret v. Petty (e), Selkrig v. Davies (f).] In the case last cited, the question was, whether the legal obligation on a bankrupt to pay his creditors out of his real estate could be enforced as to lands in a foreign country. [He referred also to *Story's Conflict of Laws (g).*]

The Plaintiff seems himself to admit the principle that I have stated; for in his original bill he prayed to have the real estate secured; but by his amended bill, feeling that that would not do, he converts it into a prayer for an account of rents and profits. But he cannot have an account of the rents and profits, without first determining the right to the land, out of which they grow.

Then if the bill cannot be sustained on the ground of jurisdiction simply, supposing no fraud in the case, can it be maintained on the ground of the fraud alleged to have been committed by the curators in obtaining the decision of the Scotch Court?

The adjudication was on the *real* title. Can you have a bill for correcting that judgment. What judgment can you substitute for it? How are you to alter that foreign record? What ground is there for coming here?

- | | |
|-------------------------------------|-----------------------------|
| (a) 2 Eden, 182. | Mac. & Gor. 546; and the |
| (b) 1 Ves. sen. 444. | Lord Chancellor's argument, |
| (c) Eq. Cas. Ab. 133 and 1 | p. 553. |
| Vern. 75. | (f) 2 Rose, 97. |
| (d) 1 Vern. 75. | (g) 2nd edit., sects. 537, |
| (e) 2 Swanst. 323. Notis | 551, 553, 554, 555. |
| <i>Vincent v. Godson</i> , 4 De G., | |

It is not alleged that the Plaintiff cannot proceed in *Scotland* to reverse the Scotch judgment, or that there would be any failure of justice in *Scotland*. But it is alleged that there has been seventeen years' enjoyment, and there is no allegation accounting for that length of acquiescence.

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Next, the bill is multifarious: it claims real and personal estate against two distinct persons, claiming through different lines of pedigree. Why am I, the real heir, to be kept before the Court, while the pedigree of the next of kin is being tried? *Dunn v. Dunn* (a).

Lastly, the bill in paragraphs 4 and 29 suggests that the "jotting book" affected the title; but there is no allegation of a disposition inconsistent with the title being in persons quite distinct from the Plaintiff. That amounts to uncertainty in the allegation of title: *Bothomley v. Squire* (b).

The Counsel for the Defendant also referred to *Barker v. Damer* (c), *Doulson v. Matthews* (d), *Attorney-General v. Stewart* (e), *Cressett v. Mytton* (f), *Crowther v. Crowther* (g), *Thomas v. Thomas* (h), *Jackson v. Turnley* (i), *Rook v. Kensington* (k).

Mr. *Anderson* and Mr. *Miller*, for the bill.

The ground of demurrer is that this Court has no jurisdiction to deal with real estate out of the jurisdiction. And first they deal with the case irrespectively of the

(a) 2 Sim. 329.

(b) 3 Drew. 517.

(c) Carth. 182.

(d) 4 T. Rep. 503.

(e) 2 Mer. 156.

(f) 3 B. Ch. Ca. 481.

(g) 5 Week. Rep. 237.

(h) 2 Kay & J. 79.

(i) 1 Drew. 6, 7.

(k) 2 Kay & J. 753.

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Scotch decision; secondly, they say there has been a decree of a Scotch Court, which is conclusive.

I will take the second point first.

Now according to the allegations of the bill, which of course must be taken to be true, the testator bribed the executors, and documents were forged, to support the title of the Defendant. Therefore, if there was a judgment, it was a judgment obtained by fraud.

We say, that a judgment procured by fraud is not merely voidable, liable to be reversed; it is absolutely null and void; it is nothing: *Duchess of Kingston's Case* (a), *Earl of Bandon v. Beecher* (b), *Meadowcroft v. Huguenin* (c), *Perry v. Meadowcroft* (d). And it makes no difference that it is a decree of a foreign tribunal: *Price v. Dewhurst* (e), *Stewart v. Alexander* (f), *Imray v. Magnay* (g), *Philipson v. Earl of Egremont* (h), *Shedden v. Patrick* (i). Therefore on this demurrer we are not dealing with a real judgment, but with a nullity.

Then on the first point. This Court has jurisdiction wherever it finds *the party* within the jurisdiction. It is not confined to cases of contract. The cases at law that have been cited turned on the nature of the action, not on jurisdiction.

They referred to 1 *Smith* (k), and the note; *Pike v.*

(a) 11 St. Trials, 243.

(b) 3 Cl. & Fin. 479.

(c) 4 Moo. P. C. Cas. 386.

(d) 10 Beav. 122.

(e) 8 Sim. 279, and 4 Myl. & Cr. 76.

(f) 1 Shaw, App. Cas. 434.

(g) 11 Mee. & W. 267.

(h) 6 Q. B. 587.

(i) 1 M'Q. Sc. Ap. 539.

(k) Page 560 et seq.

Hoare (a), *Tulloch v. Hartley* (b), *Carteret v. Petty* (c). They cited also *Sheffield v. Duchess of Buckinghamshire* (d), *Cranston v. Johnstone* (e), *Jackson v. Petrie* (f), *Meiklam v. Campbell* (g), *Story's Conflict of Laws* (h).

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It is not the contract that makes the jurisdiction; but the domicile; and here the Defendant is domiciled in England: *Bushby v. Munday* (i), *Jones v. Goddes* (h), *Carron Company v. McLaren* (l).

When a foreign instrument is set out in a bill, this Court, on demurrer, will construe the words as if it were an English instrument (m). Now the instrument is a testamentary disposition, and it creates a trust unexecuted. Even if you strip the case of fraud, there remains a trust unexecuted, and that will give this Court jurisdiction.

Then on the question of multifariousness. This is simply a suit for administering one estate. In such a suit, real and personal estate must be mixed up. The claims arise out of one and the same subject-matter, the same estate.

They argued also, that *A. Mitchell*, having assisted in the frauds as to the personal estate, might be liable to costs, though he had no interest in and had not received any of the personal estate.

(a) 2 Eden, 182, and note
 p. 185.

(b) 1 Y. & Coll. C. C. 114.

(c) 2 Swanst. 823, n.

(d) 1 Atk. 629.

(e) 3 Ves. jun. 170.

(f) 10 Ves. 164.

(g) 28 Law T. 351.

(h) 532, et seq.

(i) 5 Mad. 297.

(k) 1 Phil. 724.

(l) 5 H. of L. Cas. 416.

(m) 4 Russ. 225.

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They cited also *Russell v. Jackson* (a), and *Angus v. Angus* (b).

The *Attorney-General* replied.

I have not denied that this Court has jurisdiction in matters of personal contract, although it may affect land. But that is not this case. The Court has pointed out the true objection here. The Court has asked what equity is there between the Plaintiff and the Defendant? What relation is there of any kind known to this Court?

The Plaintiff says he is heir-at-law; and that the Defendant has got into possession as heir-at-law. That is a pure competition of legal rights. Now when the subject of competition is land, that of itself gives no jurisdiction. You may find jurisdiction founded on the relation of the parties, but that relation must be founded on contract. If there is no such relation, there is no jurisdiction. What is the fiduciary bond here between the parties? What is the contract? There is none. One is an adverse owner; the other an adverse claimant. That gives no jurisdiction unless the subject-matter is equitable; but here the subject-matter is a legal estate in Scotch land.

On the question of multifariousness. This is not an administration suit at all. There are two persons claiming, one the real and the other the personal estate; and they bring before you one who is only interested in the real estate. There are two titles, subject to a different deduction of title, to different rules. Why am I kept here while the Plaintiffs are pursuing their remedy against the other party with whom I have nothing to do?

(a) 10 Hare, 204.

(b) West, 23.

As to the fraud on which so much stress has been laid, it all relates to the land; it is a matter which can be dealt with in the proper proceedings in the proper Court, on trying the title to the land.

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The Court took time to consider.

The VICE-CHANCELLOR :

[His Honor stated the subject of the will, and the facts from the bill, and then proceeded:]—On these statements the bill prays—[His Honor referred to the prayer]—and the Defendant *Alexander Mitchell* has demurred generally for want of equity. He has also demurred *ore tenus* for multifariousness..

Judgment.

I will consider the demurrer on the record first. Now it is scarcely necessary to say, that, in order to support a general demurrer, it is necessary to show that if the cause came to a hearing on the matters alleged in the bill and proved, the Plaintiff could not have any relief at all.

The arguments in this case may be thus stated :—The bill embraces two objects; one relates to the real estate, the other to the personal estate. It is argued, that, as to the real estate, the Plaintiff can have no relief against *Alexander Mitchell*, on the ground that a Court of justice in this country is not competent to deal with the rights of parties to real estate in *Scotland*.

And as to the claim for an account of the rents and profits, it is said that as the Court cannot determine the rights to the real estate, there can be no account of the rents and profits, which are ancillary to the title to the real estate. On these grounds it is argued, that there can be no relief at all as to the real estate. Then with regard to the personal estate, it is said there can be no

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relief against *Alexander Mitchell*, because he is not alleged to make any claim to the personal estate, or to have anything to do with it.

With respect to the ground of demurrer as regards the real estate, a great deal of able argument has been addressed to me, and a great number of cases have been cited on both sides. In the view that I take, I do not find it necessary to express any opinion on the point; and without giving any opinion, I will assume that the Defendant is right, and that this Court will not give any relief on account of the real estate or the rents and profits. The question then is whether, if the bill were dismissed as to the real estate, it is clear that there can be no relief as against *Alexander Mitchell* in respect of the personal estate. It is contended that he is not alleged to have any interest in it, or to have received any part of it; and, if that were all, it would be a ground for saying there could be no relief against him. But we have this upon the bill. However improbable they may be, there are allegations against him of gross fraud, in respect of the personal estate; and I must for the purpose of the demurrer, and of course for that purpose only, take those allegations to be true.

Now this is the case made as to the acts of fraud:— There are certain letters and documents relating to personal as well as real estate. As to certain of those documents the Plaintiff charges that they were fraudulently procured (paragraph 24). Then, in paragraph 26, there is a charge of procuring fictitious extracts, and the allegation is, that both Defendants perpetrated that fraud. [The Court referred also to the charges in paragraphs 28, 33 and 34.]

Now, in order to try whether a demurrer to so much

of the bill as prays costs can be sustained, suppose this : that the bill contained no prayer relating to the real estate, but contained all these allegations. Although *Alexander Mitchell* has no interest in the personal estate, as not claiming as next of kin or otherwise, he is alleged to have assisted the other Defendant in the acts of fraud, and the bill prays that the Defendant may pay the costs.

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I apprehend if a bill is filed for relief by next of kin against the executor, in respect of the residuary personal estate, if a person, who is not alleged to have any interest, is alleged to have assisted in the fraud practised by the party against whom the relief is sought, he may be made a party, although no relief is prayed against him except payment of costs, provided the bill prays costs. I think this bill comes within that rule.

And it appears to me that I cannot in this state of the record say, that it is clear that if the cause were at the hearing, no relief could be granted.

In all this I have assumed the various allegations most strongly in the Defendant's favour, as to his having had no benefit of the personal estate.

Then on the question of multifariousness, that stands thus :—The Defendant insists, that the bill seeks relief in respect of two matters unconnected, and which ought not to be joined together, viz. the real estate and the personal estate ; and that, therefore, assuming that there might be relief, the bill is demurrable for multifariousness. On this point *Dunn v. Dunn* (a) is referred to by the Defendant.

(a) 2 Sim. 329.

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Dunn v. Dunn was a case widely different in its circumstances, and it was decided before the act making real estate liable to simple contract debts. The demurrer was allowed on the ground, that the administratrix, as such, was accountable for the personal estate; and though in her character of guardian also she was accountable for rents, she was accountable in two distinct characters.

But here the whole of the real and personal estate is included in the same disposition, which appears on the bill to have been a testamentary disposition. The real and personal estate is the subject of one instrument, vested in the same trustees, and on trusts which relate to the whole.

It is true that the heir-at-law may, in the execution of the trusts, be entitled to one part, and another person to another part.

But the whole is the subject of one instrument, and of the same set of trusts; and if this objection of multifariousness were adopted, and the Plaintiff were to file one bill in respect of the real estate and another in respect of the personal estate, the trustees might well object to be called upon by one bill to execute the trusts of the real estate, and by another the trusts of the personal estate; and if that is a proper objection on the part of the trustees, the *cestuis que trust* made parties can have no right to require two bills.

Besides, here there is a series of frauds alleged to be committed by both Defendants, for the purpose of defeating the right of the parties entitled to the property generally; a system of fraud applicable to both classes of property; and all this, if two bills were requisite, must have been stated in both bills.

I know no other case than *Dunn v. Dunn* bearing on the question, and I do not think that case applies. I am of opinion, therefore, that the demurrer *ore tenus* must also fail, and therefore the demurrer must be overruled (a).

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(a) The following is an analysis of the most material cases cited :—

I. *On the Question of Jurisdiction.*

Way v. Yally (2 Salk. 651). The action was of debt for rent on a demise at *London* of lands in *Jamaica*. The Court said, "Where an action is local it must be laid accordingly; and therefore if the lessor declares on the *privity of estate*, and that lies in *Ireland*, the action must be brought there, *for the estate is local*: therefore such lessor cannot maintain debt here against an assignee of a term in *Ireland*, for the action is founded on *privity of estate*. Otherwise when it is founded on a *privity of contract*, which is transitory, as debt for rent by lessor against lessee, for that may be maintained where the land lies not." And it was held that the action might be tried by a jury, according to the foreign law, and the foreign law given in evidence, the action being on the *privity of contract*.

In *Mostyn v. Fabrigas* (1 Cowp. C. B. 161), the question tried was, whether a native of *Minorca* could bring an action against a governor of *Minorca* for an injury committed at *Minorca*; and it was objected (among other objections) that the injury being done out of the realm was not cognizable in the king's courts; and the whole Court of Queen's Bench overruled the objection. In the judgment, however, occurs this argument: "There is a *formal* and a *substantial* distinction as to the *locality* of trials; I state them as different things; the *substantial* distinction is when the proceeding is *in rem*, and where the *effect* of the judgment cannot be had if it is laid in the wrong place. That is the case of all ejectments, where possession is to be delivered by the *sheriff* of the *county*; and as trials in *England* are in particular counties, the officers are county officers; therefore the judgment

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could not have effect if the action was not laid in the proper county."

It seems plain, from this case, that if a Court has only power to act *in rem*, an action or proceeding cannot be taken in that Court in respect of a subject matter out of its local jurisdiction; but it does not follow that a Court that asserts jurisdiction to act *in personam*, may not exercise that power in respect of a matter, whether land or otherwise, situated out of the jurisdiction.

Pike v. Hoare (2 Eden, 182) was a case of a bill filed by an heir at law for an issue to try the validity of the ancestor's will of land in *Pennsylvania*. The Lord Chancellor said he should have refused the issue on the merits, if the land had been in *England*; but he said, "I build my opinion materially on the fact of the lands lying in *Pennsylvania*; for a will of lands lying in any of the colonies is not triable in *Westminster Hall*." This was not a case of contract.

In *Penn v. Lord Baltimore* (1 Ves. sen. 444), the bill was to enforce articles of agreement for settling boundaries of land in *America*. The Lord Chancellor admitted that the settling of boundaries, as to the original right, was in the king alone, but held that the conscience of the parties was bound by the agreement; and the party being within the jurisdiction, that the Court, which acts *in personam*, might decree it as an agreement.

In *Lord Kildare's Case* (1 Vern. 405, 418), the bill was to be relieved concerning trusts of land in *Ireland*, the Defendant being within the jurisdiction. The Lord Chancellor at first thought that the bill ought to be dismissed, not however positively denying the jurisdiction. But afterwards the Lord Chancellor and the judges held that the Court had jurisdiction, on the ground, it would seem, of the trust.

Carteret v. Petty (2 Swanst. 323, note (a)) was on a bill setting forth that the Defendant had sold to the Plaintiff a moiety of lands in *Ireland*, and that the Defendant cut down wood and otherwise committed waste, and he prayed a partition and account. The Lord Chancellor allowed a demurrer as to the partition, and pointed out the distinction: that as to the account, the Defendant might be compelled by personal coercion; but as to the partition, if the Court made a

decree, it must be enforced by sequestration, and an injunction for possession and a writ of assistance, none of which could be awarded in *Ireland* nor supplied by the obedience of the person imprisoned here.

In *Vincent v. Godson* (4 De G., M'N. & Gor. 546), the distinction was also taken between privity of contract and privity of estate, and it was laid down in that case that there could not be an action in this country in respect of land in *Jamaica*, when the action rested on privity of estate, though there might be where it rests on privity of contract.

Angus v. Angus (*West's Cases*, temp. *Hardwicke*, 23) appears somewhat contrary to the cases above stated. On a bill for possession of lands in *Scotland*, and discovery of rents, &c. and fraud in obtaining the deeds, a plea that the matter was out of the jurisdiction was overruled, because it did not aver that the Defendant was in *Scotland*: from which it is to be inferred that the Court based the jurisdiction on the presence of the person. The Lord Chancellor went on to say that the jurisdiction as to frauds was on the conscience of the parties. But then his lordship seems to have doubted whether he could give relief, on the very ground taken in *Carteret v. Petty*, viz. "that he could not give the Plaintiff possession in any other way than by compulsion on the Defendant's person while it was within the jurisdiction;" and it is plain that no amount of such compulsion could make the decree run in the foreign country: ultimately the plea was overruled, without the Lord Chancellor expressly deciding the point. The case amounts then to little more than this, that on *plea* the Lord Chancellor would not decide against the jurisdiction.

Tulloch v. Hartley (1 Y. & Col. 114) was a bill filed by legatees to obtain payment out of real property in *Jamaica*, and if necessary to have the boundaries settled. And the Vice-Chancellor *K. Bruce*, adverting to the fact that the point had been argued, and having had *Pike v. Hoare*, *Penn v. Lord Baltimore* and *Bayly v. Edwards* cited to him, gave judgment without mentioning any doubt as to the jurisdiction.

The ground on which the Vice-Chancellor proceeded is not stated, but I apprehend the case fell within the class where there is contract; because the testatrix, by giving legacies chargeable on her real estate, in effect created a trust. If

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so, the decision is quite consistent with the previous cases. The case is clearly distinguishable from that of two *adverse* claimants to the *legal* estate.

Meicklam v. Campbell (28 Law T. 351) was the case of a suit to carry into effect *the trusts of a will*; and the Master of the Rolls was of opinion that this Court might entertain such a suit for administering real estate in *Scotland*.

Bushby v. Munday (5 Mad. 297), cited in the arguments in the principal case, to show that it is domicile and not contract that gives jurisdiction, did not involve the question of jurisdiction to determine the title to land. It was the case of an injunction to stay proceedings against real estate in *Scotland* on a bond given by the Plaintiff, pending proceedings in *England* on the bond, in which, if the Plaintiff was right, this Court had undoubted jurisdiction to order the bond to be delivered up. The question of legal title to the land did not arise.

Carron Company v. M'Laren (5 H. of Lords' Cas. 416) was also a case of injunction and administration of a trust estate. The suit in *England* was for carrying into effect the trusts of the will of *H. Stainton*, who had real and personal estate in *Scotland*. The company had brought an action against his trustees in *Scotland*, and if successful in the action they would be entitled to get payment out of his real estate in *Scotland*; in that sense, and in that sense only, was real estate affected; and the question of legal title to the real estate did not arise at all. The injunction was to restrain the action in *Scotland*.

II. *Upon the Question whether a Decree fraudulently obtained is void, or must be recognized by another Court till reversed by the Court which pronounced it.*

In *Meddowcroft v. Huguenin* (4 Moo. P. C. Cas. 386), Lord *Brougham*, delivering the judgment of the Court, laid it down, "that a collusive suit is not a judgment, but something obtained by fraud from the Court, which is not binding. It has been laid down in law and in equity, in reference to ecclesiastical cases, that collusion will make a nullity of a judgment, if it be between the parties." His lordship was speaking with reference to a decree of Sir *W. Scott* in the same matter. Lord *Brougham* is reported to have referred to *Thomas v.*

Ketterich (1 Ves. sen. 333) in support of his proposition. But that must be an error in the report, as the case of *Thomas v. Ketterich* contains no such decision or dictum; nor does there appear in that case to have been any suggestion of fraud in procuring the decree of the Ecclesiastical Court.

In *Perry v. Meddowcroft* (10 Beav. 122) it was insisted, on exceptions to the Master's report, that a certain sentence of the Ecclesiastical Court was obtained by fraud, and ought therefore to be disregarded. And Lord *Langdale*, addressing himself to that, said, it was insisted "that if a sentence, decree or judgment of any Court can be shown to have been obtained by fraud or collusion, it is not to be used in any Court as evidence against the right of the party who might be precluded by a sentence properly obtained. That proposition does not appear to have been disputed either in the Prerogative Court or in the Judicial Committee of the Privy Council. (His Lordship was referring to *Meddowcroft v. Huguenin*.) *A sentence may be refused the respect which would otherwise be due to it, if it can be shown, as it may be shown, that the sentence was obtained by fraud or collusion.*"

In *Bandon v. Earl of Becher* (3 Cl. & Fin. 479), which was an appeal from the Irish Chancery, one question was, as to a decree of the Irish Court of Exchequer, which decree it was said was obtained by fraud and collusion, and Lord *Brougham* said, "you may at all times, in a Court of competent jurisdiction, competent as to the subject matter of the suit itself, when you appear as an actor, object to a decree made in another Court, upon which decree your adversary relies:" and further, "if the decree has been obtained by fraud, it shall avail nothing for or against the parties affected by it to the prosecution of a claim or the defence of a right."

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1856 :  
December 18.

1857 :  
January 13, 14,  
15, 17, and  
March 27.

*Modus.*

*Customary  
Payment in  
lieu of Tithes.  
Prescriptive  
Claim of  
Payment in  
lieu of Tithes.  
Pleading.*

### CHAMPNEYS v. BUCHAN.

THE Plaintiff was the Rector of the parish of *Whitechapel*, otherwise called *St. Mary's Matfellow*; and he claimed against the Defendants *Thomas Buchan, Michael Cunningham, Thomas Martyn* and *George James*, certain sums in respect of their occupation of houses, which he alleged to be payable, either as tithes; or in lieu of and

Bill by the rector of the parish of *Whitechapel* against certain householders claiming payments in respect of their houses, either as tithes or in lieu of tithes, or as a rate-tithe.

The Plaintiff did not by his bill specifically state whether he claimed in respect of a *modus* proper, or of a special custom affecting all houses in the parish, or in respect of prescriptive rights affecting the particular houses, but at the bar contended that there was a custom.

With reference to the claim on the ground of *modus* proper, the evidence showed that the Plaintiff claimed a distinct annual sum as payable by the occupier of each house in the parish; and he claimed also an additional annual payment in respect of every additional building which might be erected on the site of any building already liable.

With reference to the ground of prescription, the evidence showed that as to three of the Defendants, their houses had been erected within memory; as to the fourth, the date of the erection of his house was not known, and a payment for 120 years was proved; but it appeared that the amount paid had varied; down to 1811 it was 8s. per year, and then it was increased to 14s.

With reference to the ground of custom affecting all the houses in the parish whenever built, the custom alleged was, that as to new houses the annual amount payable was such as should be agreed upon, and if no agreement could be come to, then to be ascertained by reference to the amounts paid for other buildings of a like nature. There was no personal evidence of the custom; and the account-books referred to, though they showed payments, did not show on what *certain* principle the custom was founded. Held, that the claim could not be supported as a prescriptive right; and that, as grounded on a custom,—first, the custom, if well alleged, was too uncertain; secondly, that it was not alleged with sufficient distinctness; and the bill was dismissed.

by way of compensation for tithes ; or as a rate-tithe. The facts and the arguments are stated and referred to in the judgment.

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Mr. *Fleming* and Mr. *Lindley*, for the Plaintiff.

Mr. *Baily*, Mr. *Burton*, and Mr. *Holroyd*, for the Defendants.

The following cases were cited :

*Archbishop of York v. Duke of Newcastle* (a) ; *Blundell v. Maudsley* (b) ; *Braithwaite v. Bosley* (c) ; *Knight v. Waterford* (d) ; *Walter v. Holman* (e) ; *Dr. Graunt's Case* (f) ; *Bryne v. Doddridge* (g) ; *Hartup v. Doddridge* (h) ; *Bean v. Lee* (i) ; *Smith v. Rooclyff* (k) ; *Carleton v. Brightwell* (l) ; *Bennett v. Read* (m) ; *Walter v. Holman* (n) ; *Collyer's Eccl. Hist.* (o) ; *Sharp v. Lowther* (p) ; *Benson v. Oliver* (q) ; *Ashby v. Power* (r) ; *Knight v. Halsey* (s) ; *Austin v. Nicholas* (t).

A book was also put in evidence called " Report and Evidence on the Claims of *Brazennose* College, and of the Rector of *Whitechapel*," and printed by Mead and Powell, 1849, and containing extracts from the proceedings in *Walley v. Cooke*, 1657 ; *Payne v. Yeomans*, 1686 ; *Williams v. Walton*, 1707 ; and other matters relating to *Whitechapel* parish.

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| (a) 1 Eag. & Y. 661.     | (k) 1 Eag. & Y. 734.    |
| (b) 15 East, 643.        | (l) 2 P. Will. 462.     |
| (c) 4 Wood, 388.         | (m) 3 Gwill. 127.       |
| (d) 4 Y. & C. 283.       | (n) 4 Gwill. 1828.      |
| (e) 3 Eag. & Y. 830, and | (o) Page 229.           |
| 4 Gwill. 1828.           | (p) 2 Eag. & Y. 62.     |
| (f) 6 Co. 16.            | (q) 2 Gwill. 701.       |
| (g) 2 Gwill. 577.        | (r) 3 Gwill. 1239.      |
| (h) 2 Gwill. 587.        | (s) 2 Bos. & Pull. 206. |
| (i) 2 Gwill. 608.        | (t) 1 Eag. & Y. 734.    |



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Judgment.

## The VICE-CHANCELLOR:

This is a bill by the Rector of the parish of *White-chapel*, otherwise *St. Mary's Matfellow*, of which part is in *London*, the rest in *Middlesex*.

The four Defendants are occupiers of houses in that part of the parish which is *not* in *London*.

The Plaintiff seeks, by his bill, to recover from the Defendants certain annual sums, which he insists are payable to him, as Rector, by the Defendants, in respect of those houses.

The sums claimed are : from the Defendant *Buchan*, 12*s.* (and 2*s.* additional from 1818); from the Defendant *Cunningham*, 8*s.*; from the Defendant *Martyn*, 8*s.* (and 10*s.* additional from 1827); from the Defendant *James*, 8*s.* (and 6*s.* additional from 1811).

These sums are alleged by the bill to be payable *for the tithes*, or *in lieu of or as a compensation for tithe*, or *as a rate-tithe*, for the said houses respectively.

It is necessary to consider on what grounds the Plaintiff may be entitled to sustain such a demand.

It is plain that a rector is not entitled, *de communi jure*, to any payment by way of tithe, in respect of any house; but the occupier of a house may, nevertheless, be liable to such a payment in one or other of the three following ways:—1. By reason of a *modus* affecting the land on which the house stands; 2. By reason of a custom in the parish, making all houses liable to a payment by way of tithe; and 3. By reason of a prescriptive right affecting a particular house.

1. It might be, that before the house was built, a *modus* was payable in respect of the land whereon it

stands, in lieu of all the tithes in kind of such land ; and if such *modus* existed, the building of the house would not deprive the Rector of his right. It must, however, be noted, that in the case here supposed, the payment would be made not in respect of a house, *quà* house, but in respect of the land, which would be equally liable to it whether the house was there or not. In fact, it would be a proper farm *modus*, i. e., a *modus* payable in lieu of the tithes in kind of a particular parcel of ground, and it would, of course, be governed by the ordinary legal rules applicable to such a *modus*. Instances of this occur in *Kynaston v. Hattersley* (a) : in *Umfreville v. Tapping* (b), where an issue was directed as to *modus* for *Hooker's* rents ; and in *Umfreville v. Campion* (c), where the same *modus* came into question.

2. Houses, though not titheable *de communi jure*, may be so by special custom ; that is, a valid custom may exist in a particular parish or district, by which the Rector is entitled to receive an annual payment from the occupier of every house by way of tithe.

It is necessary to distinguish between such a custom as this, and a *modus*.

In some of the cases, indeed, a custom of this kind is called a *modus decimandi* ; but this is not a correct application of the term, and it tends to confusion. A *modus decimandi* properly means, a particular mode or manner of tithing, which custom or prescription has substituted for the ordinary common law mode of rendering tithes in kind. A *modus*, indeed, can only exist by virtue of a custom or prescription ; but it is a custom, not creating, but modifying and altering, the original

(a) 3 Gwil. 890 ; 3 Wood,  
Decs. 9.

(b) 3 Gwil. 893.

(c) 1 Wood, Decs. 329.

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common law liability to pay tithe. Wherever there is a valid *modus*, the law presumes, that at some period before the time of legal memory, tithes were payable in kind in the ordinary common law manner; and that by some ancient composition, or agreement, or practice, dating before the time of legal memory, some other manner of tithing became substituted for it, which was, at the time, a fair and reasonable equivalent for the tithe payable by the common law. The *modus* does not create the liability to tithe, so as that if there were no *modus* there would be no liability to tithe; on the contrary, the existence of a *modus* presupposes the original liability to tithe; so that, if there were no *modus*, tithes would be payable in kind according to the common law. The term *modus decimandi* is, therefore, properly applicable to those things only which are titheable at common law, and not to things which, *de communi jure*, are not liable to tithe at all. Whenever tithe is payable for a thing which, *de communi jure*, is not liable to tithe, this can only be by virtue of a special custom which creates the original liability to tithe; so that, if there were no custom, there could be no liability to tithe. And the same custom which creates the liability to tithe must also prescribe what is payable for the tithe, and how its amount is to be ascertained, and in what manner the tithe is to be rendered or paid.

3. The third way in which the occupier of a house may be liable to pay tithe in respect of it, is by prescription. Although there may be no general custom in the parish or district by which houses are liable to tithe, a Rector may be entitled to prescribe that from time whereof, &c., the occupiers of a certain ancient house have always used to pay to the Rector for the time being a certain annual sum. It is obvious, that to sustain such a prescription, this, at least, is necessary,—

that the house should have existed from time immemorial, or, at least, that, from time immemorial, there should always have existed a house upon that same site. The principal difference between such a prescription and the custom spoken of under the second head, is this: that the custom would apply to all the houses in the parish, the prescription only to a particular house. But the two cases would stand on precisely the same footing in this respect,—that the original liability to tithe is created by the custom in the one case, and by the prescription in the other; and as, in the former case, if there were no custom there would be no liability to tithe, so, in the latter, if there were no prescription, there would be no liability to tithe at all. In one or other, then, of these three ways, the occupier of a house might be liable to make an annual payment to the Rector by way of tithe, and, besides these, I can conceive no other ground upon which a Rector could sustain a claim to any such payment.

The Plaintiff has not thought fit to state in his bill on which of these grounds he rests his title to the annual sums which he seeks to recover from the Defendants. Probably it was considered safer to leave that point open, so that at the hearing the Plaintiff's Counsel might select that ground which might appear to be most sustainable with reference to the evidence in the cause. This, however, I think I may infer from the bill,—that all the four Defendants are treated as liable upon one and the same ground, whether that ground be *modus*, or custom, or prescription, although, no doubt, it is within the limits of possibility that any one or more of them should be liable on one ground, and any other or others of them liable on a different ground, or not liable at all.

With respect to the ground of *modus*, it seems put

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quite out of the question by the evidence adduced. It appears from the collector's books, that the Rector claims a distinct annual sum as payable by the occupier of every single house in the parish; and it would be utterly incredible that every rood, or half, or quarter-rood of land in the parish should be the subject of a separate farm *modus*. Moreover, having regard to the amount of the several annual sums claimed, and the small extent of ground covered by each house, such a farm *modus* would be bad for rankness. And furthermore, the Rector claims an additional annual payment in respect of every additional building which may, from time to time, be erected on the ground which forms or belongs to the site of any house already liable to a certain annual payment; a claim which is totally at variance with the idea of a farm *modus*, which (if it exists at all) is altogether irrespective of and unaffected by the erection of any buildings on the land which is the subject of such *modus*. Indeed, the Plaintiff's Counsel has not attempted to rest his case against any of the Defendants on the ground of *modus*.

With respect to *prescription* as a ground of claim, the only one of the Defendants against whom it could be made available, consistently with the evidence, is the Defendant *James*. As I have before observed, it is essential to such a prescription that the house, which is the subject of it, should have existed from time immemorial, or at least that from time immemorial there should have always existed a house upon that same site. Now the evidence shows clearly that the houses occupied by the Defendants *Buchan* and *Cunningham* respectively have been erected within fifty years next before the filing of the bill upon ground not previously occupied by any buildings. And as to the house occupied by the Defendant *Martyn*, the first mention of it

in the collector's books is in the year 1765, no mention of it or of any house on the same site occurring in any of the preceding books, from which it must be inferred (as indeed the Plaintiff's Counsel fairly admitted), that it was merely erected on ground not previously built upon, in or about 1765. The ground of prescription, therefore, could not be sustained against the first three Defendants. With respect, however, to the Defendant *James*, the case is different. There is nothing to show the date of the erection of his house, and, for anything that appears to the contrary, the site of that house may have been occupied by a house from time immemorial. Indeed, it is by no means improbable, that such should have been the case, because *James's* house, which is No. 3, in High Street, is but a very short distance from the boundary of the city of *London*. The collector's books are in evidence, which begin in the year 1730, and come down (though with some interruptions) to the present time; and *James's* house is found charged in every one of those books. If, then, the payments during the whole period of 120 years covered by the collector's books were uniform and invariable, I should be of opinion, on the authority of *Beresford v. Newton* (a), that it must be presumed that from time immemorial a house had always stood upon the site of *James's* house, in respect of which the annual payments had been immemorially made, and that the Plaintiff had established a good title by prescription against that particular house, which this Court ought to enforce. It will be observed, that the Plaintiff's right as against *James's* house would, in that case, rest, not on any general custom, making all houses in the parish liable, but on the ground of a prescriptive title to receive a certain specific annual sum from that particular house.

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(a) 1 Crompt., Mees. & Rosc. 901.

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But such a solution of the question is rendered impossible by the fact stated in the bill, and proved by the collector's books, that whereas down to 1811 (by mistake printed in the bill as 1818), the payment for *James's* house was 8*s.*, it was increased in that year to 14*s.*, by reason of certain additions to or improvements of the house made about that time. The Plaintiff's claim, therefore, against *James* cannot be sustained on the same footing of prescription as that of the rector in *Beresford v. Newton*, but must be sustained (if at all) on the ground of a general custom, whereby all houses in the parish, whenever erected, are liable to tithes.

That such a *custom* may exist cannot (at this day at least) be disputed. True it is that, in respect of land, no tithe is payable *de communi jure*, except of such things as yearly grow and increase upon the land. But by special custom tithe may be payable for things which have not that quality, and which therefore are not titheable of common right. Thus, by special custom, the produce of a mine or a quarry may be liable to tithe, though the minerals are part of the very *corpus* of the land. And so by special custom tithe may be payable for houses, though not payable of common right.

One of the earliest cases in the books on the subject of tithe of houses, is *Dr. Grant's Case* (a) in Common Bench, at which time Lord Coke was Chief Justice of that Court.—[His Honor stated the case.] Now, so far as this case is to be considered merely as a decision that such a *custom* as *Dr. Grant* insisted upon may be a valid custom, it is right enough; but the reason assigned for granting the consultation is entirely unsatisfactory. I make this observation on better authority than my own. In the

(a) 11 Co. 16.

English edition of *Coke's Reports* of 1738, the Editor observes in a note, "The *may be, &c.*, in the first resolution, *ante*, seems a weak reason to support that resolution." And in 1 *Roll. Abr.* 642, tit. "Dismes," S. pl. 1, that great Judge, after stating the effect of *Dr. Grant's Case*, adds "*Mes quære ceo, car le reason del liver est repugnant en lui mesme.*" And why does Lord Rolle say that the reason given in *Dr. Grant's Case* is repugnant in itself? Doubtless on two grounds: first, because a *modus* (*i. e.* a customary payment in lieu of the tithe to which the land would be liable *de communi jure*) of 2*s.* in the pound, *i. e.* a *modus* varying with the rent of the land, would be bad (*a*); and, secondly, if it was a *modus*, a Court of Law would never allow the Ecclesiastical Court to try a *modus* or any other custom.

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The question of tithing houses came before the Court of Common Bench in the following year, when Lord Hobart had succeeded Lord Coke as Chief Justice of that Court. Dr. *Leyfield*, parson of *St. Clement's, Middlesex*, libelled in the Spiritual Court for tithes of houses, stating a prescriptive payment of 2*s.* in the pound on the rent. The Defendants in the Ecclesiastical Court applied first to the Court of B. R. for a prohibition on three grounds, the third of which was, that no tithes are payable by law for houses. As to this third ground, Lord Coke, who then presided in B. R., "seemed to incline" that no prohibition ought to be granted, assigning a similar reason to that on which he had relied in *Dr. Grant's Case*, *i. e.* regarding it as a

(*a*) This was decided in *v. Mitchell*, 3 Burn, Eccl. Law, 445; and see the marginal note to *Dr. Leyfield's Case*, Hob. 10.  
*Byne v. Doddridge*, 1 Lord Raym. 696; *Startup v. Doddridge*, 2 Gwill. 587; *Bean v. Lee*, 2 Gwill. 609; *Shapter*



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*modus* in lieu of the tithes originally payable *de communi jure* for the land. The case, however, stood over till the following term (a). In the meantime the Defendants in the Ecclesiastical Court applied to the Court of Common Bench for a prohibition. "The opinion of the Court was, that a prohibition was to be granted; for, *de communi jure*, no tithes are to be paid for the yearly rent or value of houses; for tithes are paid for the revenue and increase of things; and therefore no tithes are paid in any such case in any cities or towns in *England*, saving in *London*, and this parish is out of *London* and the liberties thereof. *Now where there is no tithe at all de communi jure, there never can be a modus decimandi, for that is with an abatement, correction, or alteration of the tithe in specie.*" The case was again moved by *Harris* for *Dr. Leyfield*, who insisted that *by a special custom* such a form of tithing would stand in any place; and he referred to *Dr. Grant's Case*. And it was thereupon directed by the Court that they should declare upon the prohibition, and then proceed to judgment (b).

There is another case upon the point, *Kynaston v. Willoughby*, before Lord *Hardwicke* in Chancery (c). It was the case of a bill filed by the lay impropiator of the tithes of *St. Botolph's-without-Aldgate*, for tithes of houses upon a supposed custom of payment of 1s. in 10s. according to the rent. *Dr. Grant's Case* was cited for the Plaintiff. It was objected by Defendant

(a) The case in B. R. is under the name of *Leyfield v. Tysdale*.  
 reported in 1 Gwill. 261, from the *Calthorpe* MSS., under

(c) Reported in a note to *Kynaston v. Hattersley*, 3 Gwill. 891, from Select Cases in Chancery in the possession of the Earl of *Hardwicke*.

the name of *Whitaker and Tiddersdale v. Dr. Leyfield*.  
 (b) The case in C. B. is reported in Hob. Rep. 10,

that it appeared by the books that the Rector had taken less than the demand, according to the supposed rate, and given receipts for the whole, which was deceitful only to get evidence, and did not warrant the custom laid. The Lord Chancellor said, "I do not think that material; for it is impossible for the Rector to discover the rent of every house; and he must either take what he can get, or bring bills of discovery against every occupier. And this is the reason that Lord Chief Justice *Holt* held a *modus* of this kind bad, because the Rector could not know the rents; but it may be good as a customary payment of tithes here, because it gives the Rector what he is not otherwise entitled to." His Lordship directed an issue on the custom laid by the bill; and the Plaintiff having declined the issue, the bill was dismissed with costs.

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These two cases of *Leyfield v. Tysdale*, and *Kynaston v. Willoughby*, seem to me to put the matter on the right footing. They show that, although the houses are not titheable of common right, there may be a valid custom by which all the houses in a parish are liable to make annual payments to the Rector as and for tithe, such custom applying to all houses whatever in the parish, without reference to the time of their erection. They show also that such a custom stands on its own foundation as a custom *creating the liability to tithe*, and that it is not to be confounded with a *modus*, nor its existence to be explained by the hypothesis of a supposed *modus* originally affecting the land on which the houses have been erected.

In the present case then the Plaintiff must establish the existence of a custom throughout the parish, by virtue of which all houses in the parish, whenever built,

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become liable to pay tithe to the Rector, and by the application of which custom to the houses occupied by the Defendant, the Plaintiff is entitled to the annual payments which he seeks to recover by his bill: Now it is essential to the validity of any alleged custom, that it should be certain. By this I understand not merely that the custom as alleged should point out clearly and certainly the principle or rule of the custom, but that the principle or rule so pointed out must be one which is definite and certain, so that by the application of it to each particular case, it may be known with certainty what are the rights which the custom gives in that case. To apply this proposition to a custom rendering houses liable to payments as and for tithe, not only must the custom as alleged point out clearly and certainly the principle or rule by which the payments are regulated and determined,—the *norma decimandi*,—but the principle or rule so pointed out must be one which is definite and certain, so that by the application of it to the case of each particular house, it may be known with certainty what the occupier of that house is liable to pay.

For example, in the cases to which I referred of *Dr. Grant, Whitaker v. Leyfield*, and *Kynaston v. Willoughby*, and in many others that might be cited, the custom alleged was that the occupier of every house in the parish paid a certain specified poundage on the rent. In those cases the alleged custom pointed out a definite and certain principle or rule for regulating and determining the annual amount payable by houses, by the application of which to any particular house, it could be at once ascertained, by ascertaining the rent, what the occupier was bound to pay.

What then is the custom alleged by the Plaintiff? The bill being silent on the subject, and the Counsel for

the Plaintiff having argued the case on the footing of a special custom, I invited the learned Counsel to state what he contended the custom to be. He frankly responded to that invitation, and gave me this statement of the custom :—

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“ The occupiers of all houses and other buildings built or erected, and from time to time built or erected, within the parish of *Whitechapel*, shall pay to the Rector of the said parish certain annual payments as tithes, or as rates for tithes, or in lieu and satisfaction of tithes ; and the occupiers of houses and other buildings existing within the said parish shall pay such annual payments as have been usually paid from the building and occupation of the said houses, when the period of the erection thereof is known, and when the period of erection is unknown, such annual payments as have been anciently paid in respect of the said houses and other buildings ; and the occupiers of houses newly built or erected shall pay such reasonable annual sums as shall be agreed upon between themselves and the Rector, and, in default of such agreement, reasonable annual sums, to be ascertained by reference to the amounts payable by houses of a like description in the neighbourhood thereof.”

Supposing, then, this allegation of the custom to have been contained in the bill, the question will be whether such a custom is good and valid ? My design is not to criticise the form or terms in which it is proposed to state the custom ; on the contrary, I should endeavour to put it, if possible, in such a shape as to avoid any mere technical difficulty. But in whatever form it may be attempted to enunciate this alleged custom, it appears to me that it lacks what is essential to the validity of a custom, the quality of certainty.

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The principle or rule which it proposes for ascertaining what any newly erected house is liable to pay is two-fold ; 1st, that the Rector and the occupier should agree as to the annual amount which the house should be liable to pay ; and, 2ndly, where they cannot agree, the annual amount payable for the house or building is to be ascertained by reference to the amounts payable by other houses or buildings of a like description in the neighbourhood thereof. With respect to the former, it is hardly necessary to say that a custom, that a newly erected house should be liable to pay such an annual amount as the occupier and the Rector might agree upon, would be void. With respect to the latter, it appears to me that such a custom would be equally void for uncertainty. I have searched in vain among the cases relating to customs for anything in the least approaching to such a principle or rule for ascertaining the amount payable as this of referring to the amounts payable by houses or buildings of the like description in the neighbourhood. What is to be the test by which we are to try whether a certain house or building is of the like description with another house or building ? Is the likeness to depend on annual value, or fee-simple value, or size, or form, or the materials used in the structure, or a combination of all or some of these considerations, or on what is it to depend ? Who is to judge of the likeness ? Is it to be tried by the evidence of an array of architects, surveyors, and builders, called as witnesses on the one side and the other ? Besides, if we examine the rule or principle here proposed with every disposition to support it if possible, it is obvious that it assumes that there are, and always have been, in this parish, houses and buildings of every possible description ; otherwise, if a house or building should be erected, or should have been erected at any time during

the six or seven centuries which have elapsed since the commencement of the time of legal memory, of a description different from that of any house or building then existing in the parish, it would be impossible to ascertain the amount which it ought to be liable to pay. Suppose a large hospital, or infirmary, or theatre, or hotel, to be for the first time erected in the parish, where shall we find a building of the like description in the neighbourhood, by reference to which it can be ascertained what ought to be paid for the newly-erected building? It assumes, moreover, that throughout the whole parish, all houses and buildings of the like description (by whatever test that similarity of description is to be tried) have always paid an equal annual amount, a fact which is neither alleged nor attempted to be proved, and which there are strong reasons for believing is entirely without foundation. And unless the fact be so, if there should be two or more houses or buildings of the like description in the neighbourhood paying different annual amounts, which of them is to govern the amount payable by the newly-erected house? I might pursue this subject further, and suggest other considerations to show the impracticability of applying such a rule or principle as that which is proposed by the statement of the alleged custom. But I have said enough to illustrate the grounds upon which I am obliged to arrive at the conclusion, that such a custom as is suggested is void for uncertainty.

Supposing, however, that such a custom would be good and valid, what is the evidence to prove its existence in this parish? The collector's books show beyond doubt that all or most of the houses in the parish have, from the year 1730, or as to such of them as have been subsequently erected, paid from the time of their

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erection, or at least been charged with, certain annual sums (generally a few shillings) as and for tithes; and some few receipts are produced which were given to the Defendant *Buchan* for his payments, stating them to be for tithes. But these books do not show or in any way refer to any particular rule or principle regulating the amount imposed upon newly-erected houses or buildings, or in respect of additions to or improvements of existing houses, although a very great number of new houses and buildings have been erected in the parish since 1730, when the books commence. There is no evidence of any living witness as to the existence of the alleged custom, or indeed of any custom whatever, although numerous houses have been built in the parish within living memory. Not a single instance is adduced of the amount payable for tithe by a newly-erected house or building having been fixed by reference to the amount paid by houses or buildings of the like description in the neighbourhood thereof. There is no terrier or other written document stating or even alluding to the existence of any such custom.

In the parliamentary survey of 1650, it is stated that the value of the rectory of *Whitechapel* is 250*l.* a year, "to be levied upon house rates;" but the document is silent as to the principle or rule by which the levy was regulated; the mention of "house rates," however, seems rather to point to a rating of the houses according to their rent or annual value; but the Plaintiff does not, either by his bill, or at the bar, rest his claim on any such ground as that. Some stress has been laid by the Plaintiff's Counsel on the recital in the Act of Parliament of 1694, by which Act the hamlet of *Wapping* was made a distinct parish. But that recital does not support any such custom as that which is here

alleged. In short, except the fact, that all or most of the houses and buildings in the parish have for about 120 years paid, or been charged with, certain annual sums in the name of tithes, there is no evidence whatever of any such custom as that which is proposed by the Plaintiff's Counsel, or indeed of any particular custom whatever.

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There being a total absence of evidence to prove affirmatively the existence of any such custom in the parish as that which is alleged, is there any evidence the other way? I lay little stress on the representation made by *Ilsey*, the late collector of the Plaintiff, to the Defendant *Martyn*, when he called on him for payment of tithe, that the matter was quite optional on *Martyn's* part. Nor do I think that any great weight ought to be attributed to the evidence given by the Plaintiff before a Select Committee of the House of Commons, when, in answer to a question, whether the church of *White-chapel* was endowed, he answered in these words,—“It is a rectory, and the income is raised partly from fees in the church, and partly from the tithe, or more properly the Easter offerings from the parishioners.” There are, however, some items of documentary evidence which, I think, tend more or less strongly to negative the existence of such a custom as is now contended for.

[His Honor then referred to an old book in the possession of the Rector, containing entries made by former Rectors of matters relating to the parish, the earliest of which were made by Mr. *Davie*, who was Rector from 1749 to 1756; to the record of the proceedings in the suit of *Walley v. Cook* in the Exchequer, which was instituted in 1656 by the Rev. Mr. *Walley*, a former Rector of the parish of *Whitechapel*, against



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certain occupiers of houses in the parish to compel payment by them of certain sums of money in respect of their houses, and to the record of the proceedings in the suit of *Payne v. Cowse*, instituted in the Exchequer in 1687, by the Rev. *Wm. Payne*, the then Rector of this parish, against a great number of persons occupiers of houses and premises in the parish ; and drew therefrom the inference that their tendency was to negative the existence of any such custom as now alleged.]

I am far from saying that the items of evidence to which I have referred are sufficient of themselves to prove conclusively, and beyond all doubt, that there is no such custom in the parish as that which is propounded on behalf of the Plaintiff, or that their effect might not have been neutralised by other evidence proving its existence. But in the total absence of any such evidence, I think that the documents to which I have referred are entitled to some weight as tending to negative the existence of the alleged custom. At all events I must come to the conclusion that no such custom is proved to exist ; and, for the reasons I have before stated, if its existence were fully proved, I should be of opinion that it would be void for uncertainty.

But there is still another objection to the Plaintiff's claim in this suit, viz., that the bill contains no allegation of the custom relied on at the bar. If a Plaintiff seeks to enforce a demand against the Defendant which is founded upon a special custom, and, therefore, against common right, I think he is bound to allege that custom clearly and distinctly by his bill, and if he omits to do so he cannot sustain the suit. It is not enough to allege that the Defendant ought to make to the Plaintiff a certain payment without saying that he claims it by

virtue of a custom; nor is it enough to allege that some undefined custom exists by virtue of which he is entitled to the payment he claims. The rules of pleading require that the bill should allege with reasonable certainty and distinctness, not only the existence of the custom from time immemorial, but the nature and particulars of such custom, including the principle or rule of the custom, by the application of which to the case of the Defendant, his liability to make the payment claimed is shown. The extreme strictness with which this rule is enforced in an action at law, is well known; and although in this Court we are not so rigid with respect to pleading as in the Courts of Law, still the same general principle in this respect must be substantially adhered to. Nor is this requirement a mere technicality; it is matter of substance and of justice. It would be most unjust that the Defendant should be compelled to defend himself by evidence against the Plaintiff's claim founded on custom, without knowing the nature or particulars of the custom, on which the Plaintiff intends to rely. Besides, where a contest arises in this Court respecting an alleged custom, the most usual course is to send the matter to be tried at law, by directing an issue; but how is it possible to do this, if no custom is alleged by the bill? What custom is to be stated in the issue? Now, upon looking at the Plaintiff's bill, I find that not only is no particular custom alleged by virtue of which he is entitled to recover from the Defendants the payments which he claims, but it is only by inference and conjecture that it is possible to arrive at the conclusion that the Plaintiff's claim is founded upon any custom at all. The only passage in the bill which, in the smallest degree, approaches to an allegation of any custom as the foundation of the Plaintiff's claim, is in paragraph 3 of the

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bill, in which, after a general statement that as Rector he is entitled to all tithes, &c., belonging to the Rectory, he states that in particular he is entitled "to receive certain annual payments from or in respect of all houses, and other buildings built or erected, and from time to time built or erected, and existing within the said parish, and to demand, take, and receive the said annual payments from the occupiers of the said houses, and other buildings." It is not alleged that these annual payments have been paid or payable from time immemorial, nor is it stated whether the claim is founded on prescription, or custom. It is making a very large concession to the pleader, to admit that this passage amounts even by implication to an allegation, that any custom at all exists; but, supposing that to be admitted, there is at least not a shadow of an allegation, from which it is possible even to conjecture the nature or particulars of the custom, or by what principle or rule of the custom the Defendants are liable to make to the Plaintiff the payments which he claims.

It has been suggested by the Plaintiff's Counsel, that this bill is framed on the model of that in the case before referred to of *Walley v. Cook*; and that he is entitled to ask for a decree on the authority of that case. It does not appear to me that the case furnishes any such authority. [His Honor referred to the proceedings in that case, which were put in evidence in this cause.]

There is a case which seems to afford some countenance to the frame of this bill, viz., *Pocock v. Titmarsh* (a). It is difficult to determine on what principle that case was decided. And at all events it cannot be recognized as establishing a rule (contrary to all princi-

(a) Bunb. 102.

ple and authority) that a bill, simply asserting the Plaintiff's right to receive certain annual payments from the Defendants for the tithes of their houses, without alleging the foundation of the alleged right, can be maintained.

Upon the whole, then, for the reasons I have stated, I am compelled to come to the conclusion, that the bill in this case must be dismissed.

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GRIMSON v. DOWNING.

THE question in this cause turned on a devise in the codicil to the will of *Isaac Downing*.

*Isaac Downing*, by his will made in 1808, gave certain freehold estates to his nephew *Joseph Downing*, to hold the same to him his said nephew *Joseph Downing*, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and after his decease, the said testator gave and devised the same unto and amongst all and every the child and children of the said *Joseph Downing* lawfully to be begotten, whether sons or daughters, to hold to them, their heirs and assigns, for ever, equally as tenants in common, and not as joint tenants. And if only one child, to such only child, his or her heirs and assigns for ever; but in case his said nephew should happen to die without issue, or such issue should die before he, she or they should attain the age of twenty-one years, and without leaving lawful issue, then he devised the same as therein mentioned. And the said testator also thereby gave and devised unto his said nephew *Joseph Downing*, son of his said brother *Paul*, all that farm-house and other real estate, to hold the

A devise by will to *A.* for life; remainder to *A.*'s children and their heirs as tenants in common. Devise by codicil of after-purchased estates to *A.* for life, remainder to the heirs of his body lawfully begotten for ever, equally share and share alike, sons or daughters, but if *A.* should die without heirs or heir, then over. Held, that *A.* took an estate tail in the property devised by the codicil.

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same to him his said nephew *Joseph Downing*, and his assigns, for and during the term of his natural life, without impeachment of, or for any manner of waste. And from and after his decease the said testator gave and devised the same unto and amongst all and every the child and children of the said *Joseph Downing*, lawfully to be begotten, whether sons or daughters, to hold to them, their heirs and assigns for ever, equally as tenants in common, and not as joint tenants; and if only one child, to such only child, his or her heirs and assigns for ever. But in case his said nephew should happen to die without issue, or having issue such issue should die before he, she or they should attain the age of twenty-one years, and without leaving lawful issue, then he devised the same in manner therein mentioned.

*Isaac Downing* made a codicil to his will, dated the 8th day of December, 1812, and thereby, after reciting that since the making of his will he had bought and purchased an estate of the Rev. Mr. *Simpson*, clerk, then residing at *Bath*, which said estate was situate and being at *Honington*, in the parish of *Hales Owen*, and county of *Salop*, and in the holding of *Henry Granger*, tenant, he gave, devised and bequeathed the said estate, subject to and chargeable with the therein underneath written legacies, with all the lands, buildings, premises and appurtenances thereto belonging, unto his said nephew *Joseph Downing*, son of his brother *Paul Downing*, for his natural life, and then and after to the heirs of his body lawfully begotten for ever, equally share and share alike, sons or daughters; but if he the said *Joseph Downing* should happen to die without heirs or heir, then he gave, devised and bequeathed the said estate to his niece *Mary Downing*, daughter of his brother *Paul Downing*, to have and to

hold for her natural life, and then to the heirs or heir of their body lawfully begotten, share and share alike for ever.

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The question was, whether *Joseph Downing* took an estate tail in the freehold, and an absolute estate in the leasehold; or whether he took only a life estate, and the heirs of his body took as purchasers.

Mr. *Swanston*, for the Plaintiff.

We say this is a life estate to *Joseph*, with remainder to his children. If you look at the will, you find that he gave a clear life estate to the same devisee, with remainder to his children. He meant by his codicil to do exactly the same.

*Jesson v. Wright* will be cited against us, but, properly understood, that case is not against us. What was there decided was, that when there are no words of inheritance in the gift over, the Court will infer that the words apparently putting a construction on "heirs of the body" different from its technical meaning, will be discarded, in order to effectuate the obvious general intention, of giving the inheritance; but here there is no necessity for the application of the principle of *Jesson v. Wright*, for we have the words "for ever," which do give an inheritance; then, how can an estate tail be given to hold share and share alike? you cannot discard those words and strike them out of the will. Then the testator uses the words "sons or daughters;" that is an expression applicable to children, and he meant by using it to say, that it was in that sense that he used "heirs of the body:" *Jesson v. Wright* (a);

(a) 2 Bligh. 1; 5 Maule & Sel. 95.

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*Sugd. Law of Prop. (a); Doe v. Goff (b); Montgomery v. Montgomery (c).*

Mr. G. L. Russell with him.

The words "heirs of the body" are here used not merely to modify the anterior gift, but as describing a new class of devisees: that is the distinction between this class of cases, and those which fall within the rule in *Shelley's Case*.

Then the words "for ever" are quite inconsistent with the creation of an estate tail; they imply a perpetuity, a fee. So, the words share and share alike are inconsistent with an estate tail. We do not dispute *Jesson v. Wright*; but the decision there was to give effect to the general intention of passing the inheritance. Here the inheritance is expressly given. [He cited *Wright v. Creber (d)*; *North v. Martin (e)*]. So in this case "heirs of the body" means sons and daughters, and that construction does not defeat the general intention.

Mr. C. Hall for other parties in the same interest.

The rule in *Shelley's Case* has nothing to do with the intention; you must first find the sense in which the words are intended to be used. If they are intended to be used in their technical sense, then the rule in *Shelley's Case* applies. Now here the subsequent words used, which are quite inconsistent with the use of the words heirs of the body in their technical sense, show

(a) Pages 250, 253, 254.

(b) 11 East, 668.

(c) 3 Jones & Lat. 47.

(d) 5 Barn. & Cress. 866.

(e) 6 Sim. 266.

that the testator did not mean to use them in that sense, but in the sense of sons and daughters: *Goodtitle v. Herring* (a).

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Mr. *Wood*, for another party in the same interest, took the same line of argument, and commented also on the gift over to *Mary Downing*; he argued on the limitation over to *Mary* for life, and then to the heirs or heir of her body, that there could not be an heir in tail; or, to speak more correctly, a limitation to "an heir of the body" is not an estate tail; and therefore the testator could not have intended to create an estate tail, as it was clear that he meant to create in the devise to *Mary*, the same species of estate that he had created in favour of *Joseph*.

Mr. *Baily* and Mr. *Osborne*, for the Defendant *Isaac Downing*, claiming on the footing of an estate tail.

It is said we are to look at the will to construe the codicil. That is not the course of the Court. But if we do look at the will, it is rather in our favour, because in the will the testator has created clearly and in terms a life estate without impeachment of waste, and remainder over to purchasers. That rather affords an inference, from the dissimilarity of language, that the testator did not mean to create the same kind of estate: *Ex parte Wynch* (b).

But, looking at the codicil alone, if you have a clear expression of intention that the words heirs of the body are used in a sense different from their primary and technical sense, that is one thing; but if you have no such clear expression of intention, then you must give them their legal signification.

(a) 1 East, 264.

(b) 5 De G. M'N. & Gor. 188.



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The question after all really is, in what sense did the testator use words which are of themselves clearly words of limitation. [He referred to the cases in 2 *Jarm.* 299 *et seq.*]

Now it is said the words "for ever" control them, but these are mere words of surplusage, used to indicate permanence, just as you find draughtsmen say, to A. "and his heirs for ever." The words "for ever" do not extend the estate; they do not convert an estate tail into a fee. In a sense an estate tail is for ever, that is, for ever if the issue last so long, just as an estate in fee is for ever if the heirs last so long. Strictly no estate is for ever.

Then the words "share and share alike" are said to cut down the estate tail. But, according to the cases cited by Mr. *Jarman*, if you have an estate which by the form of its limitation is an estate tail, such words do not destroy it; they are rejected as repugnant. [He cited also *Doe v. Smith* (a); *Robinson v. Robinson* (b); *Bennett v. Tankerville* (c).]

The last case is exactly this case, if you leave out the words "sons and daughters."

Then *Pierson v. Vickers* (d) shows that those words do not make any alteration; and here sons and daughters will be read, male or female, showing only that the testator intended an estate tail general, not an estate tail male.

(a) 7 T. R. 532.

(b) 1 Bur. 38.

(c) 19 Ves. 170.

(d) 5 East, 548.

Thus we find that every one of the expressions used here, has in some case been held not to alter the primary signification of the words heirs of the body. If none of them separately have that effect, have they such effect because united in one will? We say not.

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They cited also *Doe v. Fetherston (a)*; *Fetherston v. Fetherston (b)*; *Doe v. Cooper (c)*; *Doe v. Harvey (d)*.

If there was an estate tail in the realty, of course there is an absolute estate in the leasehold.

Mr. Swanston in reply.

The VICE-CHANCELLOR :

The whole object of the Court in cases of this kind must be to discover what was the testator's intention; and I apprehend that in endeavouring to ascertain the intention, all words and expressions must be taken in their primary, and if they are technical words, in their technical sense, unless, in the words of Lord *Redesdale*, it is very plain that they were not intended to be so used. In this case the question arises on the words "heirs of body," technical words, well known to all lawyers: it is perfectly clear that they may be used in another sense; but their primary sense is technical. The word heirs may be used to designate either the persons to take, or the estate to be given. Now, with regard to the rule in *Shelley's Case*, if it were *res integra*, I think that rule would not at this day be established, and it is not to be used for the purpose of finding out the intention of a testator. I must first find out what is

Judgment.

(a) 1 Barn. & Ad. 944.

(c) 1 East, 229.

(b) 3 Cl. & Fin. 67.

(d) 4 Barn. & Cress. 610.

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the sense in which the testator has used the terms "heirs of the body," and when I have done that, the question can arise whether the rule in *Shelley's Case* applies.

The question being, in what sense in this case the testator has used the words "heirs of the body," I must look at every part of the will. The Plaintiff's Counsel referred to the devises in the will itself as being to the same persons as those designated in the codicil, and contended, that you are to infer from that, the same intention in the codicil as in the will. I think that is not a legitimate mode of finding out the testator's intention. It does not follow, because the testator devised some property to *Joseph* in the will in one particular way, that therefore he must have meant to devise other property to the same person in the same way by the codicil. But if I might refer to the will, I think the inference would rather be, that the testator having used different language in the codicil, he must have had a different intention.

Then it is said, the testator clearly meant to give *Joseph* an estate for life and for life only; I entirely assent to that, but I think it cannot be referred to for the purpose of ascertaining the meaning of the words "heirs of body." Suppose you shut out the rule in *Shelley's Case*, what then? Why, the "heirs of the body" would take as purchasers; and therefore there is nothing in that opposed to a life estate in *Joseph*. Then to come to what follows; it is very strong: the words "heirs of the body" are technical words; the words "for ever" would not affect their meaning. Then there are the words "share and share alike." Now it is clear that they cannot so take; still when I find that the Courts, grappling with similar and even more difficult

words, have held them not sufficient to overcome the force of the words "heirs of body," whatever my own opinion might have been, I cannot undertake to overrule these decisions. Then we have besides, the words "sons or daughters." Now the natural interpretation of those words would be, "sons or daughters of the tenant for life." But, in the first place, they are not connected with him by the word "his;" and, in the next place, the words are not sons *and* daughters, but sons *or* daughters. The first gives to the heirs of his body; that would include all his issue. I think the fair question of interpretation is, whether he did not mean "male or female;" whether he did not mean to give an estate in tail general: at all events, I think these words, sons or daughters, do not present a tithe of the difficulty which the other words do. Then we come to other words, "heirs *or* heir." It has been most ably argued, that these words must be read in some other than the ordinary sense; there is much force in the argument; still I think it is not tenable to the extent to which it has been urged. I think, first, that I cannot modify those words, "heirs *or* heir," so as to treat them as meaning anything more than "heirs of the body;" and even if they do not bear that interpretation, still, I think, it could only be brought to this: a gift over if *Joseph* died without an heir of his body.

I do not mean to presume to suggest that Lord *St. Leonard's* view of *Jesson v. Wright* is not correct; but I do not think he intended to imply, that, wherever there are words which would carry the fee, there "heirs of the body" should not be construed as words of limitation; and that but for the absence of those words *Jesson v. Wright* would have been otherwise decided. Further, however, the only words here, capable of giving the fee,

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are "for ever." Now did the testator intend by these words to give the fee? Are they not merely used, as they often are by conveyancers, to import permanence? as in the common expression referred to by Mr. *Baily*, "*heirs and assigns for ever*." On the whole, I can only come to the conclusion, that *Joseph* took an estate tail; and I think the testator meant to give to *Joseph* the same estate in leasehold as in the freehold; there is no distinction between the two.

[The declaration was accordingly, that *Joseph Downing* took an estate tail in the real estate and an absolute estate in the leasehold estate comprised in the codicil.]

July 13.

*Specific  
Performance.  
Jurisdiction.*

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DARBEY v. WHITAKER and Another.

An agreement for sale of leasehold premises and the goodwill of a trade, and certain fixtures to be taken at a valuation, to be made by two guagers, to be named, or their umpire. Held, that the Court could not decree specific performance of an agreement, one part of which was left to be determined by arbitration.

THIS was a bill for specific performance.

By lease dated the 6th day of May, 1851, and made between *Thomas Wood* of the one part, and the Plaintiff of the other part, certain premises, known as the "*Royal Albert*," at the date of the bill occupied by the Plaintiff as a beer-house, were demised to the Plaintiff, his executors, administrators and assigns, from the 29th day of September, 1847, for the term of twenty-one years, at a rent of 80*l*.

The Plaintiff and the Defendants respectively entered

into and signed the following agreement, in writing:—  
 “Memorandum of an agreement made and entered into this 23rd day of October, 1856, between Mr. *Frederick Darbey*, of *Albert Terrace, Paddington*, (hereinafter called the vendor,) of the one part, and *Thomas Whitaker* and *William Abbey York*, of 6, *Hawley Place, Kentish Town*, (hereinafter called purchasers,) of the other part. The said vendor, in consideration of the sum of 50*l.* to him now paid by the said purchasers, as the said vendor doth hereby acknowledge, by way of deposit, and in part of the sum of 545*l.*, the consideration agreed to be given for the purchase of the lease of the messuage or tenement hereinafter mentioned, and for the trade, good-will and possession thereof, and of the residue of such purchase-money to be paid as hereinafter stipulated, agrees, on or before the 11th day of November next, to assign unto the purchasers, their executors, administrators or assigns, or such person as they shall appoint, all that messuage, tenement or beer-house called the *Royal Albert*, situate in *Albert Terrace, Bishop's Road, Paddington*, with the yard, out-buildings and appurtenances thereto belonging, for the residue of a term of years, for which the said vendor holds the same under lease, of which twelve years were expired from Michaelmas last, subject to the yearly rent of 80*l.* and to the covenants in such lease contained, (the same, nevertheless, being only the usual and ordinary covenants contained in leases of beer-houses,) and from all other incumbrances; and the said vendor agrees to deliver to the said purchasers possession of the premises on or before the 11th day of November next, clear of all rent, rates, taxes and gas to that time, and to make good or allow for the external broken windows, and to make such other allowances as are usual for outgoing to incoming tenants of beer-

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houses. Also to sell to them all the tenant's fixtures, furniture and effects in the said house and premises at such price as the same shall be valued at by Mr. *Geo. Knight* and Mr. *Lounds*, or their umpire; and also all his present good and saleable stock of porter and ales which shall then be in the said house and premises, not exceeding porter three butts, ale twelve barrels, at the valuation of two licensed guagers, to be named by the parties hereto or the umpire of such two guagers. And the said vendor further agrees that he will not take or occupy a public-house, or be directly or indirectly interested or concerned in the trade or business of a licensed beer-seller, retail brewer, or dealer in beer by wholesale or retail, within one-third of a mile of the said premises, while the said purchasers or their widows shall continue possession thereof; or, in the event of his doing so, that he will, within fourteen days after the demand thereof, return and pay to the said purchasers, their executors or administrators, 150*l.*, part of the said purchase-money for the goodwill in trade, as liquidated damages, without any abatement whatsoever. A covenant to this effect to be inserted in the said assignment for the consideration aforesaid: the said purchasers agree to accept such assignment without requiring evidence of any title prior to the above-mentioned lease, nor make any objection thereto, notwithstanding any recital, statement or covenant therein contained, or by reason of the lease being a derivative or underlease. And they agree to pay to the said vendor the sum of 495*l.* residue of the purchase-mones for the said beer-house, trade and goodwill and possession, as before mentioned, on the execution of the said assignment and the delivery thereof to them, and the possession of the said beer-house and premises; and they agree at the same time to pay the said vendor the

sum at which the said tenant's fixtures, furniture, effects and stock shall be valued in the manner before mentioned, and a due proportion for the unexpired term in the current policies of insurance against fire of the said premises, effects and stock, and in all other respects to fulfil this agreement on their parts. It is further mutually agreed between the vendor and purchasers, that all expenses attending the completion of this agreement shall be borne and paid by them in equal moieties ; and after either of them shall refuse or neglect to perform this agreement on his or their part, he or they shall pay unto the other of them, who shall be willing to complete the same, the sum of 150*l.*, as or in the nature of liquidated damages, and recoverable," &c. [The rest was immaterial to the questions argued.]

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Mr. Baily and Mr. Kingdon, for the Plaintiff.


The agreement is a clear and positive agreement for the purchase of the lease and the goodwill annexed to it, and for the purchase of the fixtures and stock in trade, to be taken by valuation. On the first point, there can be no doubt ; on the second, the valuers are named, and it must be assumed that they will value. In fact the Defendant is compellable to obtain a valuation ; there can be therefore no difficulty on that point.

Mr. Glasse and Mr. Tripp, for the Defendant.

1st. We say that the value of the goodwill or trade has been misrepresented.

2nd. That the insurance has not been kept up, and therefore the lease is liable to be forfeited.

3rd. The title is bad ; the original lease of 1843 is not

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produced, and the clause in the agreement, relating to objections to title, does not protect the Plaintiff against the production of that lease.

4th. The sale of a goodwill is not capable of specific performance. This is a mere sale in substance of a goodwill, for the lease is at a rack rent and has no value.

5th. The stock in trade and fixtures form part of the consideration of the agreement. It is all one agreement for the sale of the lease, the goodwill, and the fixtures and stock in trade. It is impossible to say what portion of the consideration was for one of those things, and what portion for the other. Now, how can the Court compel a valuation? It is true the valuers are named, but suppose they will not value? And in fact the evidence shows that our valuer will not value. Can the Court compel him? and if not, what decree can it make. A decree in the terms of the agreement could not force the Defendant to compel a valuation, nor the valuer to value, and the decree could not be enforced. This Court will never make a decree that it cannot enforce (a).


They referred to *Coslake v. Till* (b); *Dakin v. Cope* (c); *Baxter v. Conolly* (d); *Milnes v. Gery* (e); *Blundell v. Brettargh* (f); *Gregory v. Mighell* (g).

Mr. *Baily* in reply.

(a) The judgment proceeded entirely on the last point. The arguments on the other points are therefore not fully stated.
 (b) 1 Russ. 376.

(c) 2 Russ. 170.
 (d) 1 Jac. & W. 576.
 (e) 14 Ves. 400.
 (f) 17 Ves. 232.
 (g) 18 Ves. 328.

The VICE-CHANCELLOR desired him to confine his reply to the last objection.

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Mr. Bailey. Why is the fact of a collateral part of the agreement, being the subject of valuation, to prevent specific performance? The agreement is in fact in two distinct parts. There is the contract for sale of the lease and goodwill; a clear distinct agreement. Then there is the contract for the sale of the fixtures and stock in trade, to be the subject of valuation. The Court must assume that the valuers will proceed.

The VICE-CHANCELLOR.

Many objections have been taken by the Defendant; one is, that the Plaintiff has failed to produce the original lease. I think there is nothing in that objection. [His Honor referred to the clause in the agreement, and stated he was of opinion that protected the Plaintiff.]

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Then, it is said, there is a forfeiture, or a liability to forfeit, by reason of the Plaintiff not having duly insured. I think the Defendant wholly fails in proof of that.

Next, it is said, there is misrepresentation of facts as to the value of the trade. The onus of proof of such misrepresentation lies on the Defendant, and I think in that also he has failed.

Next, it is said, there can be no specific performance of a contract to purchase a goodwill. No doubt, you cannot have a specific performance of a contract to purchase a goodwill alone, unconnected with business premises, by reason of the uncertainty of the subject-

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matter. But when a goodwill is entirely or mainly annexed to the premises; and the contract is for the sale of the premises and goodwill, there is not the slightest ground for doubt, that such a contract is a fit matter for a decree in a suit for specific performance.

Next, it is argued that time was in this case of the essence of the contract; but when I find that the non-performance of the contract on the day arose from the Defendant himself insisting on some terms, that is not a ground on which he could resist specific performance.


Then, lastly, is raised a question in which it is with great regret that I feel myself under the necessity of refusing a decree.

By the terms of the contract, the premises are to be sold for a fixed sum, and besides the premises, the Plaintiff agrees to sell the fixtures and stock in trade. [His Honor referred to the passage in p. 136.]

Now I assume it to be clear that this Court has no power to decree specific performance of a contract for sale or purchase at a price to be fixed by arbitration, unless the arbitrators have actually fixed the price.

It appears to me that that is implied by the very nature of a decree for specific performance. What would it be? A decree that directs payment to the Plaintiff of such a sum of money as *A.* and *B.* shall fix. I never saw such a decree, and I think the Court cannot make it, on the ground that this Court will never make a decree that it cannot see its way to enforce. Now how could I enforce such a decree? What is the time to be allowed for arbitration? How can I compel the arbi-

tration? It appears in this case as a fact, that one of the arbitrators has refused to go on, because he was told by the Defendant that he did not mean to complete. How can I be sure that he will go on? And even if the arbitrators do go on, and differ, how can I compel the appointment of an umpire?

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[His Honor then adverted to the argument, that the agreement was composed of separate parts, and decided that it was not; that it was one agreement.

[The bill was accordingly dismissed, but without costs, the Court considering that moral justice was on the Plaintiff's side.]

INNES v. MITCHELL.

THE nature of the case made by the bill in this case appears in the Report of it on demurrer, *ante*, p. 57.

This was a motion by certain of the Defendants to discharge an order obtained by the Plaintiffs for service on three Defendants resident in *Scotland* of the amended bill and interrogatories, and affidavits were filed to show that those Defendants were domiciled in *Scotland*; and that proceedings were actually going on in *Scotland* in which the questions before the Court in this suit would be determined.

June 23.

Practice.
Service out of
the Jurisdiction.

The authority of the Court to order service out of the jurisdiction is entirely discretionary, and may be as well exercised to discharge an order made on an *ex parte* application, as in granting or refusing the motion singly.

Mr. *Baily* and Mr. *Cotton*, for the motion.

The question is, whether a party in *England* can be allowed to bring a suit here which ought properly to

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be carried on in a foreign Court. The Scotch Courts are, by the Act of Parliament, foreign Courts. The Defendants, against whom the order is made, are all domiciled in *Scotland*; the subject-matter is the construction of a Scotch will. All the questions in the suit are really upon Scotch law; and there is a suit in *Scotland* upon those very questions. We are concerned only in the personal estate; and, with a trifling exception, all the personal estate is actually in *Scotland*. Why, then, should this Court be asked to exercise its extraordinary jurisdiction to draw to itself a purely Scotch litigation? The serving of the bill on the Defendants out of the jurisdiction is not a matter of right in the Plaintiff; the order is not an order of course, but an order obtained on merits, from the discretion of the Court. The Acts 2 & 3 Will. 4, c. 33; 4 & 5 Will. 4, c. 82, and the Orders of 1845, give the Court a discretion. And an order obtained under them in Court *ex-parte*, on insufficient merits, may properly be discharged on merits more fully shown.

[They cited *Elliott v. Minto (a)*; *Whitmore v. Ryan (b)*.]

Mr. *Anderson* and Mr. *Miller*, for the Defendants.

This motion is, at least, premature; it is, in effect, a motion to stay the suit upon merits, showing that this Court cannot deal with it so well as the Scotch Court. How can this Court determine that, at least, till the merits are confessed by the answer? The Court cannot here, on a few affidavits, know the whole merits of the case, and must assume that all the allegations of the bill may be maintained by evidence. If so, then on the

(a) 6 Mad. 16.

(b) 4 Hare, 612.

merits the cause ought to be tried here. There is property in *England* now. There was a large sum in *England*, in the names of two of these very Defendants, which they have sold out. We have a right to know what has become of them. The Scotch Courts have not the same machinery as this Court for extracting admissions from a Defendant. But besides the merits, this motion is irregular. The order is not, it is true, strictly an order of course; but it is an order which it is compulsory on the Court to make. The order is obtained under the Acts of Parliament which are compulsory; the Orders of 1845 do not affect the right of the Plaintiff in that respect.

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[They cited *Preston v. Melville*(a); *Jones v. Geddes*(b); *Kennedy v. Cassillis*(c); *Bushby v. Munday*(d).]

The VICE-CHANCELLOR:

The first question is, whether this application is proper. It is said that it ought not to be made at this time. The solution of that question depends on this: whether it is discretionary in the Court to make the order for service out of the jurisdiction; and that it is, I have no doubt whatever. There are two Acts which, under certain circumstances, authorize service of *subpœna* on Defendants out of the jurisdiction. The first is, the 2 Will. 4, c. 33—[His Honor referred to the 1st section, and said that, as to its discretionary character, there could be no doubt]. Then there is the 4 & 5 Will. 4, c. 82. [Referring to the other Act, His Honor read the sections of the Act and proceeded]:—

Judgment.

It is clear that the discretionary power given by the former Act is imported into this Act.

- | | |
|---------------------------------|-------------------|
| (a) 15 Sim. 35; 8 Cl. & Fin. 1. | (c) 2 Swans. 313. |
| (b) 1 Phil. 724. | (d) 5 Mad. 297. |

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So with regard to the Orders of 1845, it is clear that under them the authority of the Court is discretionary.

If that is so, then what ought the Court to do when an application is made to it to authorize service out of the jurisdiction? The Court clearly must judge when it is fit and proper upon the circumstances to direct service. But when the application is made, as it is *ex parte*, there may be occasions when the Court cannot have for its information all those arguments upon the circumstances which it ought to hear to determine whether it is fit to direct service or not; and in a case like this, when it has occupied a whole day to argue whether the circumstances render the service fit and proper, it is impossible to suppose that where on a mere *ex parte* application the order was granted, the Court could have had the opportunity of sufficiently considering the grounds of its discretionary exercise of authority; and, therefore, where the order has been so granted, it is quite competent to the Court to discharge it. I am of opinion that it is quite competent to the parties to make this motion now; and then the question becomes this: if all the materials now before me had been so when I made the order, ought I to have made it?

The case presented by the Defendants is very strong; they say, here is a lady domiciled in *Scotland*, who never even resided in *England*; she makes a testamentary disposition of her property in the Scotch form, passing her real estate and her personal estate, and using in it terms purely of Scotch law.

She appoints trustees and executors in *Scotland*, and having large real estates in *Scotland* and also personal estate, she devises all her real estate to her heir.

It does certainly seem strange that in that state of things the suit should not be in *Scotland*; and if it were merely a question of withholding the matter from the Scotch Courts, I should agree with the Defendants and refuse this application.

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But the case made by the Plaintiffs varies it considerably. They say they are two English persons resident in *England*, who had a Scotch relative; that she had personal property in *England* invested in the English funds; that the persons whom she appointed executors came to *England*; proved her will here; by virtue thereof possessed themselves of her English property; and having so possessed themselves of it, by fraud handed it over to persons who had no right to it. Those are the allegations of the bill, and for this purpose I must assume that they may be true; that they may be made out by evidence. Then they say there are two parties who took possession of the English property; and that although they handed it over to *Mitchell Innes*, it is now actually standing in the bank books in the names of *Mitchell Innes* and *A. Mitchell* or one of them. So that if that allegation is true, the very property is now in this country; that presents a very different case from the case made by the Defendants. It is founded on the English probate; on the allegation that under that probate the original funded property is now in specie in this country. If that is established, and I repeat, I must assume that it may be established, it is impossible to say that this Court is not, so far at least as regards the English property, the proper tribunal.

Then are there not some circumstances strong to show

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that I ought to give the Plaintiff the advantage of suing in this country ?

First, as to the discovery, I cannot ignore the fact that the Scotch Courts do not give discovery as these Courts do. They have not by their process what is understood by discovery, in the way we have it in the Court of Chancery.

Then where there are allegations as to the conduct of Defendants, conduct which they, and probably they only know, the mode of getting discovery is an important ingredient, which renders, I think, this jurisdiction more fitting than that of the Courts of *Scotland*. Further, this Court has a facility of jurisdiction over or with reference to the Bank of *England*, I mean for obtaining information from the Bank, which in this case, on the allegations, is peculiarly important, and which the Courts of *Scotland* do not possess.

Then of the Defendants, one is actually within the jurisdiction ; and though he does not claim in respect of the personal estate, he is stated to be a party to the fraud against those who do claim it, and to be in fact one of the two in whose names the fund stands.

But then it is said there is a proceeding going on in *Scotland* which will determine the questions in this suit. The answer to that is, that it may be convenient that that proceeding should go on ; but that is no bar to proceedings taking place here also ; nor does it appear clearly that the proceedings in *Scotland* necessarily involve all the questions in this suit : they may do so, but it does not appear that they necessarily must do so. On the whole I think the motion must be refused, but under the circumstances without costs.

1857:
June 30.

*Uncertainty.
Construction.*

RANDFIELD v. RANDFIELD.

THE will of *William Randfield*, so far as it is material, was as follows:—"I devise all my freehold messuages, dwelling-houses, gardens, hereditaments and premises situate at *Harwich*, partly in my own occupation and my tenants; and I devise all my copyhold lands, houses, gardens and farm in the parish of *Dovercourt*, in the borough of *Harwich*, known by the names of *Wreck Farm*, *Crooked Elms* and *Jolly Sailor*; also a piece of freehold land laying on the north end of *Jolly Sailor*, and a freehold piece laying next the shore, on the east side of *Fronks*. I also devise all my copyhold lands, with cottage, garden, hereditaments and premises, situate in *Little Oakley*, in the county of *Essex*, to my son *William Cass Randfield* after my decease, and when he shall have obtained the age of twenty-one years, upon the following conditions being complied with, agreeable to this my will; that *Ann Randfield*, his mother, shall receive annually the sum of 120*l.* sterling, issuing out of rents of all my houses, farms, cottages, gardens, lands, tithes, hereditaments and premises, to be paid to her half-yearly, viz., at Michaelmas-day and Lady-day, or within fifteen days after such periods arrive, so long as she lives and remains my widow, and to have one of my houses to live in, rent free, and to be furnished with all requisite furniture and beds, and with linen, plate, glass, books, &c., to be selected from my present household furniture, for her use during her life. I then give and devise to my son *W. C. Randfield*, all my personal estate, what-

A clear gift by a will to testator's son, on his attaining twenty-one, followed by limitations over, the construction of which was very doubtful. Held, that the rule applied; that a clear gift cannot be cut down except by limitations equally clear.

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soever and wheresoever, with all my vessels, coasting vessels, parts and shares of vessels, securities for money, mortgages, bonds, notes, with all funded property standing in the name of *William Randfield* in the books of the Governor and Company of the Bank of *England*, and also of my private banks, with all my stock in trade, residue of household furniture, plate, linen, goods, chattels, and all my effects, of whatever nature, kind or description, at the time of my decease; *but should the hands of death fall on my widow Ann Randfield, and son William Cass Randfield, and my having no other children, and my son any issue lawfully begotten, my will is, that should he leave a widow, that she shall receive the annual sum of 50l. sterling during her widowhood, out of my real estates as before mentioned, the residue then to be equally divided, share and share alike, after paying such legacies as I may hereafter name, the division of property to be between my late brother Richard Randfield's surviving children and my sister Jesse Warner's children, my sister Rachael Squirrel's children, and my niece Grace Burton and my niece Sarah Stuart, they paying all my son's just debts, funeral expenses and demands, or my wife's should she be the longest liver."*

W. Randfield, the testator, died in 1844, leaving his son *W. C. Randfield* surviving, and he never had any other child.

W. C. Randfield attained twenty-one, and made his will in 1855, by which he gave all his interest to his wife, and appointed her his executrix. He died in 1856.

The bill was by his widow, the Plaintiff.

Mr. *Baily* and Mr. *Shebbeare* for her, contended that the son was absolutely entitled on attaining twenty-one, and that she was so under his will. The gift over was not to take effect if the son attained twenty-one; at any rate it did not extend to the personalty. [They cited *Home v. Pillans* (a).]

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Mr. *Swanston* and Mr. *Kay*, for the testator's widow.

Mr. *Glasse* and Mr. *Dickenson*, for the other Defendants claiming under the limitations over. They admitted the son was to have an absolute interest on attaining twenty-one, but liable to be defeated if he had no issue; in that event the limitations over were intended to provide for the other branches of the testator's family: *Genery v. Fitzgerald* (b); *Allen v. Farthing* (c); *Cooper v. Cooper* (d).

Mr. *Baily* in reply.

The limitations over are so encumbered with doubt that you cannot make out what the testator intended; it is impossible to say what he meant by residue: whether he meant residue of real and personal, or only of personal estate. Then what is the effect of directing the remaindermen to pay all the son's debts, or the mother's; that must suppose the limitation over to take effect only on the son's dying under twenty-one. You have a clear gift to the son in the first instance; that cannot be cut down by anything so ambiguous as the whole of these limitations over.

(a) 2 Myl. & K. 15.
 (b) Jac. 468.

(c) 2 Jarm. Wills, 688.
 (d) 1 Kay & John. 658.

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v.
RANDFIELD.
Judgment.

The VICE-CHANCELLOR :

The first part of the will is beyond all doubt: on the son's attaining twenty-one, the testator gives to him all his real and personal estate absolutely, subject to the annuity to the widow. Then the question is, how is that gift affected by what follows. Now what follows is not only very inaccurately expressed, but it appears to me to raise doubt what the testator meant. First, he says, "but should the hand of death," &c. Here he has used words of contingency, not only as to the death of his son, but of his widow; and then he adds another contingency, "my having no other children;" and then another contingency, "or my son any lawful issue." Then he directs that, "should his son leave a widow;" and then he gives the residue.

Now there is considerable ambiguity as to what the testator means by the residue; but then follows the clause, "they paying all," &c. [His Honor commented on the various meanings that might be attributed to these clauses, and concluded.]

Certainly, the whole together is so involved in ambiguity, that, without going into the cases, it appears to me that I must apply the broad and well-known principle, that if you have a clear gift, it shall not be cut down by anything subsequent, unless it is equally clear; and it appears to me, that in this case there is so much doubt about the residuary clause, that the prior gift of the real and personal estate must prevail; and the son, having attained twenty-one, took an absolute interest.

HOWARD v. KAY (a).

IN THE MATTER OF THE 56TH GEO. III. c. 60; and
8 & 9 VICT. c. 62.

1857:
May 29.

THIS was a Petition by *William Howard, Thomas Masterman, and Robert Sutton.*

*Commissioners
of National
Debt.
Evidence.*

William Kay, described in his will, dated the 4th of August, 1834, as "late of *Tring Park*," gave an annuity to his son *Richard Smith Kay*. He gave certain real estates to the Petitioners, upon certain trusts for *William Kay*, his only child, and his issue in tail; and he devised the rest of his real estate and his residuary personal estate to the Petitioners, upon trust "to make sale and convert into money all such of his personal estate as should be in its nature saleable, *not being monies in the public funds*," and to sell his real estate, and to convert the proceeds of both, and the trusts of the proceeds were for *William Kay* and his children: the particulars of the limitations are not material. The Petitioners were also executors of the will. The testator died in 1838. The testator's estate, so far as it was ascertained, was in course of administration in this cause, and the Petitioners alleged that they had discovered only in December, 1856, that the testator was possessed of 5,000*l.* £3 per Cent. Reduced, and

What evidence will be requisite on a petition under the 56 Geo. 3, c. 60, and 8 & 9 Vict. c. 62?

(a) Although no specific point was decided in this case, the Reporter has considered that it will be found of practical value, as to the evidence requisite in support of petitions for the re-transfer of stock by the Commissioners of National Debt.

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HOWARD
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a sum of 135*l.* 16*s.* Long Annuities, standing in his name, and that such annuities had been transferred under the 56th Geo. III. c. 60, from the name of *W. Kay*, to the Commissioners for the reduction of the National Debt, in consequence of no dividends having been demanded for ten years and upwards. A claim was then made by the Petitioners to the Bank to re-transfer; but in consequence of a counter claim being made by another person as one of the next of kin of the testator, the bank refused to re-transfer the stock. And the testator's executors were therefore obliged to present this Petition, praying that the Commissioners of the National Debt might transfer the stock and dividends into Court in the cause.


Two points arose on the Petition : one as to the construction of the will directing the conversion of his personal estate; the other as to the evidence of the identity of the testator *William Kay*. The latter point only was argued on this occasion.

The stock stood in the name of "*William Kay, of York Terrace, Regent's Park.*"

The testator was described, as above stated, in his will as of "*Tring Park.*"

The evidence of identity was an affidavit by Mr. *Pearce*, who deposed that he was intimately acquainted with *William Kay*, late of *Tring Park*, from 1824 to 1838; that he had a town house at *York Terrace, Regent's Park*, in which he resided for some years, and in which he died, and then it proceeded—"the person named or described as "*Wm. Kay of York Terrace,*

Regent's Park, in the notices and advertisements published in the *Morning Herald* and *Times* newspapers, of the 29th and 30th of December, 1856, (referred to in the Petition), is the same identical person as the said *W. Kay*, late of *Tring Park*, the testator in the pleadings," &c.

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Mr. *Rasch* and Mr. *Rawlinson*, for the Petitioners.

Mr. *Wickens*, for the Crown, objected to the evidence of identity as not sufficiently precise; it might be that there was another *William Kay* of *York Terrace, Regent's Park*; it was not shown when the stock was purchased,—inquiry as to which might show more completely the identity.

Mr. *Dickinson*, for *William Kay*.

Mr. *Bovill*, for other parties.

The Petition was ordered to stand over, to inquire when the stock was purchased; for evidence to show that there was no other person then answering the description except the testator; and for the Petitioners by affidavits to verify their title, and show the manner in which they had discovered the existence of the stock.

1857 :
July 10.

*Winding-up
Acts.
Benefit Building
Societies.*

Re The ST. GEORGE'S BUILDING SOCIETY.

A benefit building society of the ordinary kind, certified under the 6 & 7 Will. 4, c. 32, is within the Winding-up Acts, 1848 and 1849.

THIS was a Petition for a winding-up order, in the matter of the *St. George's Benefit Building Society*, established in 1854, for erecting freehold and leasehold buildings, for the investment of the savings and the division of profits among the shareholders; the rules of the society were duly certified under the 6 & 7 Will. 4, c. 32. The society was in a failing state, and the case would, if it were an ordinary trading association, have been within the Winding-up Acts. The only question was, whether a society under the 6 & 7 Will. 4, c. 32, came within those Acts.

Mr. *Swanston*, jun., for the Petition, cited *The Sherwood Loan Society (a)*.

Mr. *S. A. Foot*, of the Common Law Bar, *contra*. He argued that such a society was not a trading partnership; there was no dealing with strangers; it was a mere club, and clubs have been decided not to be within the Acts. [*The St. James's Club Society (b)*; the 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108, were commented upon.]

He argued also, that benefit societies duly certified and inrolled were by inference excluded by the 2nd section of the Winding-up Act, 1848.

(a) 1 Sim. (N. S.) 165.

(b) 2 De G. Mac. & Gor.
383.

The VICE-CHANCELLOR said :—

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Re The
ST. GEORGE'S
BUILDING
SOCIETY.

The language of the 1st section of the Winding-up Act, 1849, is this, that the Act of 1848 shall apply to "all partnerships, associations and companies whereof the partners or associations are not less than seven in number, whether incorporated or unincorporated, and whether formed or subsisting before or after the passing of the said Act or this Act, other than and except railway companies incorporated by Act of Parliament."

Then does not this case come within these general words? This society appears to me to come within the description of a "partnership," at any rate it is certainly an "association," and in one sense it is a company.

Then the question is, if it is within these general words, is there any reason why the effect of those words should be restricted?

The argument relied upon is this, that the 2nd section of the Act of 1848 enacts, that "all associations or companies formed for the purpose of working mines or minerals, and all benefit building societies, other than such as are duly certified and inrolled under the statutes in force respecting such societies, shall be liable to the operation of this Act;" and that since there is this special language in the 2nd section, we must assume that the intention of the 1st section of the same Act is not to include such societies. But I think that argument is not tenable, and for this reason: the words in the 1st section are not "all companies," &c., but all companies, &c. whose capital is divided into shares, transferable without the consent of all the copartners. Therefore, as there may be benefit

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societies whose capital is divided and transferable without consent, and others whose capital is not so divided, I think the effect of the 1st section is to include one class of benefit societies, and the intention of the 2nd is to include all benefit societies not included in the 1st section; therefore I think the argument founded on the dissimilarity of the two sections is not tenable; and when I find the Lord Chancellor, while Vice-Chancellor, holding that a *loan* society is within the Act, I cannot see any such distinction between a society such as this and a *loan* society, as would justify me in saying, that I ought not to come to the same conclusion with regard to *benefit* societies.

I think, therefore, that this society does come within the Winding-up Acts.

[The common winding-up order was accordingly made. Costs of both parties out of the fund.]

1857:
Nov. 9
and
Dec. 18.

BOND v. BELL.

Usury.

THIS was a bill filed by a judgment creditor of one *Glen*, a bankrupt, against his assignees, and against *Bonthron*, who claimed to be a purchaser for valuable consideration, without notice of the Plaintiff's judgment.

A loan of money on security of bills at six months and an agreement for a judgment; the judgment is void as against the land under the 2 & 3 Vict. c. 37, but is not void *in toto*.

The bill prayed in substance, that the Plaintiff might be declared to have a lien, in the nature of an equitable mortgage, on the freehold and leasehold estates of *Glen* (subject to certain incumbrances, the priority of which was admitted), but in priority over *Bonthron's* charge. The money was borrowed on an agreement that it should be secured by a bill at six months and a judgment. The allegations of the bill on this point were as follows:—

In par. 2 it alleged, that in the month of October, 1853, *Adam Glen* applied to the Plaintiff and requested him to advance to him 600*l.* on his bill of exchange at six months' date, to be renewed for a further term of six months; the payment of the renewed bill to be secured by a judgment in an action by the Plaintiff for 600*l.* with stay of execution for twelve months.

3. That the Plaintiff consented to discount *Glen's* bill, and with such agreement for renewal on the terms aforesaid; and that for carrying the said agreement into effect, *Glen* and the Plaintiff proceeded to the chambers of a Judge: and then the bill set out a Judge's order made on *Glen's* consent.

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BELL.

The Plaintiff's judgment was signed on the 6th of October, 1853, and a memorandum thereof registered on the same day.

On the 25th of September, 1855, the Plaintiff registered a memorial of his judgment in the proper Registry Office for *Middlesex*. The property principally in contest was a leasehold house, in the county of *Middlesex*, in which *Glen* had carried on business as a baker.

The defence was this, that *Bonthron* had purchased the leasehold in question, without notice of the Plaintiff's judgment; that shortly before the 18th of August, 1855, he agreed with *Glen* for the purchase of the premises for 3,800*l.*; that by arrangement with and direction of *Glen*, he paid the 3,800*l.* to certain millers to whom *Glen* was indebted; that he paid it on the 18th of August, 1855, in this way: as to 3,400*l.*, by three promissory notes for 1,133*l.* 6*s.* 8*d.* each, payable on demand, one of which notes he gave to each of *Glen's* creditors; and as to 400*l.*, the remainder, by giving up to them the good-will of a business of his own.

The promissory notes were not produced, and it appeared by the evidence that they had not been paid, but were still held by the creditors of *Glen*, the original holders. *Bonthron*, however, swore he was ready to pay them whenever presented.

Bonthron took a conveyance of the premises on the 22nd of November, 1855, on which was indorsed a receipt for the purchase-money as of that date.

He tendered proof by affidavit, to show that on

the 18th of August, *Glen's* creditors, on receiving the promissory notes, gave him written discharges for the amount of the notes, 3,800*l*; but these discharges were not produced, nor otherwise proved than by the affidavits tendered in evidence. It was admitted that *Bonthron* had some actual notice of the judgment before he took the conveyance.

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The dates, therefore, stood thus:—

Plaintiff's judgment . 6 Oct. 1853, registered same day.

„ 25 Sept. 1855, registered in the
Register Office Middlesex.

Defendant's purchase . 18 Aug. purchase-money paid or
provided for by promissory
notes.

„ 22 Nov. conveyance executed.

In this state of things, the questions raised were—

I. Whether there was any legal proof of the date of the alleged payment.

II. Whether the payment by promissory notes was a payment so as to constitute a contract for purchase part performed, and whether notice before conveyance, though after payment of the purchase-money, did not postpone the purchaser.

III. The question, whether the security was not void for usury, was also argued, and on this point alone the judgment turned.

Mr. *Glasse* and Mr. *Cracknall* for the Plaintiff.

It is contended that the Defendant *Bonthron* had no notice; if he had no notice at all, we agree that, by the fifth clause of the 2 & 3 Vict. c. 11, he would not be bound. But is it the fact that he had no notice? We

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gave him notice of the judgment before the completion of the transaction; and, moreover, the judgment was registered before the completion of the transaction; he cannot therefore plead no notice: *Sug. V. & P. (a)*, *Tourville v. Nash (b)*, *Wigg v. Wigg (c)*. But besides, is any purchase at a date before notice proved?

1stly. Payment by promissory notes, and those not even paid, is not payment of purchase-money; incurring a liability on an instrument not negotiable, without indorsement, is not a payment of money. It is merely incurring a debt, and giving a right of action at a future time.

2ndly. If the notes were a payment, there is no proof of their date. The only evidence of the contents of a written instrument is the instrument itself. Now, neither the notes nor the discharges are produced. The whole question is their date; and an affidavit cannot be read to prove that, when it is not pretended the notes are lost.

They referred to 2 *Eq. Cas. Abr. (d)*, *Attorney-General v. Gower (e)*, *More v. Mayhew (f)*, *Beames on Pleas (to show the form of a plea of purchase without notice) (g)*, *White & Tud. Leading Cases (h)*.

Mr. *Bury* for the assignees.

Mr. *Baggallay* for another Defendant.

(a) Concise edit. 619.

(b) 3 P. Will. 306.

(c) 1 Atk. 382.

(d) Page 685, plac. 9.

(e) 2 Eq. Cas. Ab. 685, pl. 11.

(f) Free. 175, and 1 Ch. Cas. 34.

(g) Page 238.

(h) Page 16, notis.

Mr. *Baily* and Mr. *Caldecott* for *Bonthron*.

Payment by a promissory note is a payment sufficient to constitute a contract for purchase.

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Now that a contract for purchase gives an equitable title is unquestionable: *Whitworth v. Gaugain* (a). But it is said we had notice after payment of the purchase-money, but before the conveyance; and *Wigg v. Wigg* is relied on; that is the only case; and it is only a *dictum*, the circumstances of the case did not require a decision, and there was none. Moreover, that can only apply when the equities are equal. Here they were not; the Plaintiff had only a judgment—the Defendant had an equitable estate. Lastly, the Plaintiff's contract is usurious. There is an agreement for a judgment in aid of six months' bills. That is an agreement for a charge on land, and it is admitted the interest is usurious. It will not be contended that now a judgment is not a charge on land; it was not so, strictly speaking, before the 1 & 2 Vict. c. 110, but it is expressly made so by that Act, and then the 2 & 3 Vict. c. 37, as expressly excludes a charge on land, where the forbearance is on bills at more than three months' date, from the relaxation of the usury laws. It is immaterial to us whether the agreement for a judgment is void as to the bill itself, as well as with regard to the judgment; it is sufficient to show that the judgment at law is void.

[They cited *Smith v. Hurst* (b), *Sug. Vend. & Purch.* (c), *Jolland v. Stainbridge* (d), *Wyatt v. Barwell* (e), *Johnson v. Holdsworth* (f).]

(a) 1 Phil. 728.

(b) 1 Col. 705.

(c) Page 104, 11th edit.

(d) 3 Ves. 478.

(e) 19 Ves. 435.

(f) 1 Sim. N. S. 106.

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Mr. *Glasse* in reply.

The only legal proof of any payment is the receipt on the deed, and that fixes its date after notice.

The promissory notes and discharges are not produced, and secondary evidence cannot be read. The Defendant's case therefore fails *in limine*, and we are entitled to an immediate decree: *Marten v. Whichelo* (a), *Molony v. Kernan* (b).

As to the question of usury, a judgment is not taken as a conveyance; it is taken as a personal security. To show that the transaction is usurious, you must show that the security was taken with a view to the real estate; *Lane v. Horlock* (c); that is the distinction. We do not contend that a judgment is not a charge; and we do not contend that an agreement to take a judgment made with a view to the land is not void. But we say that what the 2 & 3 Vict. contemplates is a charge upon the land; a charge intended to *operate* on the land; not a common judgment, which incidentally may affect the land. The effect of that statute is to make the *contract* wholly void. If therefore its construction is that contended for, it must make the bill itself void. Further, if that is the right construction, if a creditor on a bill brings an action on the bill, and obtains judgment, that judgment as affecting land, must avoid the contract just as much as if it were a judgment in a consent action. That cannot have been the intention of the legislature. You must see whether the agreement contemplated land, or whether the intention was to take a judgment, simply as if an action had been brought and judgment obtained,

(a) Cr. & Phil. 257.

(b) 2 Dru. & W. 31.

(c) 1 Drew. 587, and 5 H. of L. Cas. 596.

and if the latter was the intention, we say it is not within the 2 & 3 Vict. c. 37.

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Taylor v. Baker (a), Tenison v. Sweeny (b), Lord Red. Plead. (c) were also cited.

The Court took time to consider, and on the 18th of December delivered the following judgment.

The VICE-CHANCELLOR :

This is a bill by a judgment creditor, seeking to establish and enforce his judgment as a charge on the real estate of the debtor, under the 1 & 2 Vict. c. 110.

One defence is, that as the debt bore more than 5*l.* per cent. interest, the Plaintiff cannot claim under it a charge upon the real estate, by reason of the provisions of the 2 & 3 Vict. c. 37. If the Defendant is right in that there is an end of the suit, and it is unnecessary to consider the other defences.

The solution of the question turns on the true construction of the 2 & 3 Vict. c. 37; and it is necessary for that purpose to consider that statute, not merely alone, but in connection with other statutes relating to usury.

By the 12 Ann. stat. 2, c. 16, it is enacted, that no person shall on any contract take for loan of any monies more than 5*l.* per cent., and all bonds, &c., for a greater interest shall be void; and so the law stood for more than a century. The 3 & 4 Will. 4, c. 98,

(a) 5 Price, 306.

(c) Page 275.

(b) 1 Jon. & Lat. 710.

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enacts, in sect. 7, that "no bill of exchange or promissory note made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void, &c." Then in 1837, the act of the 7th Will. 4, c. 80, extended the exception to bills at not more than twelve months. Now, by the terms of these acts, the relaxation of the law is expressly limited to bills and notes. It was not contemplated by them to relax it in respect of any charge on land. It was, however, determined on those acts, that although the creditor could not have a direct charge on land, yet if he had contracted to grant the loan on bills, there was no reason why he should not have the security of land to secure the bills; and thus there was under these acts an indirect method of charging lands.

The 7 Will. 4, c. 80, was only temporary; but before it expired the 2 & 3 Vict. c. 37, was passed, which is the statute on which the question in this cause turns. It is the same as the 7 Will. 4, so far as concerns bills at twelve months. But it also relaxes the usury laws as regards all contracts for the loan of money; but it contains the following proviso:—"That nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, rents or hereditaments, or any estate or interest therein." That act was only temporary; but it was renewed from time to time, until at length the 17 & 18 Vict. c. 90, altogether swept away the usury laws.

Now, with regard to the 2 & 3 Vict. c. 37, whatever other questions may arise upon it, this at least is clear,

that under the proviso in it, if the *security* of land is given for forbearance (unless it is given to secure a bill not having more than three months to run), that *security* is absolutely void. If the contract is also for other security besides land, it may be void either *in toto* or only in part; but at any rate, the security on land is absolutely void; and it signifies not in what form the security is, whether it is by mortgage, or by deposit, or by agreement; the term used by the act is *security*. So that if a man borrows money on six months' bills, and by way of security agrees to deposit with the lender title deeds, such agreement is void. [The Court referred to *Follett v. Moore* (a).] So, if the borrower in such a case agrees with the lender to execute an equitable charge, such agreement is void. In short, anything which purports to effect a security on land is void.

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If these principles are sound, what then is the operation of the act in this case? Here, money is borrowed at more than 5*l.* per cent. interest, on the security of bills at six months and a judgment—[His Honor referred to the allegations of the bill set out in p. 157, to show what the agreement was.]

The question is, what is the operation of the statute of the 2 & 3 Vict. on these facts. And the only question to be determined is this:—Is a judgment a security on land, or is it not?

Now, what was a judgment before the 1 & 2 Vict. c. 110, and what is it by virtue of that statute? A judgment at common law in an action for money, irrespectively of any statute, is nothing more than a sentence

(a) 4 Exch. 410.

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of a Court of Law, declaring the opinion of the Court, that the Plaintiff is entitled to recover a sum of money. That is the nature of a judgment; and execution upon it is merely the process of the Court, causing the money to be raised out of the Defendant's property; neither the right to issue execution, nor execution issued, constitutes a *security*, properly so called. Before the Statute of Westminster, at common law, the only species of property that could be taken in execution under a judgment were goods and chattels, and the *profits* of land. The Statute of Westminster introduced a new subject, by enabling a judgment creditor to obtain execution against the land itself, (that is, against a moiety of it,) by *elegit*. A judgment, it is true, is often spoken of as a general lien upon the debtor's land. But that only means that, as by the Statute of Westminster the creditor is entitled to his writ of *elegit*, the effect is this, that the judgment debtor could not by alienation withdraw his land from the judgment. It is also true that before the 1 & 2 Vict. c. 110, a judgment creditor could come into equity to enforce his right against an equitable estate of his debtor; but that was only that he might obtain against an equitable estate the same kind of remedy that he could obtain by *elegit* against a legal estate.—[His Honor referred to the observations of the Lord Chancellor in *Neate v. Duke of Marlborough* (a), and then went further into the learning of judgments before the 1 & 2 Vict., and concluded thus:]—

It appears then to me, that before the 1 & 2 Vict. a judgment was not in the proper and usual sense a *security* on land. But the 1 & 2 Vict. gave a new and additional character to a judgment. If that act had

(a) 3 Myl. & Cr. 407.

done no more than extend the operation of an *elegit*, it would have left the matter where it stood. But by the 13th section it enacts that a judgment shall operate as a charge on real estate.—[His Honor referred to the words of that sect.]—By that section a judgment is made an actual charge, as fully as if the debtor had *agreed* to charge the land. And this operation of the act is irrespective of the intention of the parties: whatever might be their intention *inter se*, the judgment is a charge.—[His Honor then referred to the Lord Chancellor's judgment in *Rolleston v. Morton(a)*.]—If then a loan of money, on an agreement by the borrower to charge his land with the money, amounts to a security on the land, the loan of money on a judgment, which is made a charge by the statute, is also a loan on the security of land; and if it is, then if the interest is usurious, that security is by the proviso of the 2 & 3 Vict. void.

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It was argued, that if that is the construction, it would be most disastrous; for that, if it is so, it must follow that if the holder of a note brings a *bonâ fide* action and gets judgment, that judgment is wholly void. But I do not think that is the proper conclusion from the doctrine, and that brings me to the consideration of a question on which there have been different judicial opinions. Suppose *A.* lends to *B.* a sum of money at 6l. per cent. on *B.*'s promissory note at twelve months, and on a mortgage of *B.*'s land: the question on which there is a difference of opinion is this, whether the contract is void *in toto*, or is void only in part? The mortgage security clearly would be void, but is the whole security void? Looking at the act, it

(a) 1 Con. & Law. 252: see p. 266.

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appears to me that in the enactments relaxing the usury laws the intention of the legislature was not to make the promissory note void, but only to make void that portion of the security which consists of the mortgage; when the opposite construction has been adopted, then this course has also had to be adopted, viz., to ascertain whether the contract was or was not entered into with an *intention* to make it a security on land; and then you bring the question to a test of great uncertainty, depending upon the terms of the instrument and upon evidence. And this is to be observed, that if that were the course to be taken, the intention could hardly ever be brought home to the parties, because the usurious lender would take good care that nothing should pass which could be construed into any intention to look to the land. No doubt there have been *dicta* at common law to support the construction referred to, but there is no express decision; and on the other hand, I find sufficient authority to justify the opinion I have myself formed.—[His Honor referred to *Ex parte Knight* (a), and *Ex parte Warrington* (b).]

Now, if I had no further authority than those cases, those alone would be sufficient to support the view I take. But the question came again before Vice-Chancellor Wood in *James v. Rice* (c). And I had myself previously decided *Lane v. Horlock* on that ground. Unfortunately in that case when before me, it was overlooked, both at the bar and by me, that it turned on three months' bills, so that it came under the Act of 3 & 4 Will. 4: but before me the case was argued and deter-

(a) 1 Deac. 459.

(c) Kay, 231.

(b) 3 De G., M. & G. 159.

mined on the grounds that I am now considering ; and when it came before the House of Lords, their Lordships did not hold that the decision was wrong on the ground argued, but on the ground that the bills were three months' bills.—[His Honor then referred to passages in the Lord Chancellor's judgment, and also adverted to the distinction taken by Lord *Brougham* between a warrant of attorney to confess judgment, and a judgment, and then continued :]

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Now, is there any distinction between a warrant of attorney to confess judgment, and a judgment ? Suppose a borrower, instead of *giving* a mortgage, *agrees* to give a mortgage, the *agreement* is void. If the *agreement* is, that he will give an equitable charge, that is void ; if he *agrees* to deposit title deeds, that *agreement* is void. Suppose the agreement is to deposit title deeds, and his deeds are in the possession of his solicitor at a distance, and he gives the lender an authority to receive the deeds, of course the whole is void. What is a warrant of attorney to confess judgment but an authority to obtain a judgment ? and how can there be any distinction between a warrant of attorney, which is an agreement for a judgment, and a judgment ?

However, in this case, there is no necessity for deciding whether there is any such distinction, because here is an express *agreement* for a judgment.

I come then to the conclusion that this is the proper principle : if there is a loan of money on bills at six months, and part of the security is land, it is not void *in toto*, but bad as a security upon land. A judgment is of a two-fold nature ; in one character it operates not

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as a security on land, in the other as a security on land, and in that second character it cannot be enforced.

[The bill was, therefore, dismissed, but, on the ground of the doubts that had prevailed, without costs.]

Dec. 22, 23.

Seisin.

Vendor and

Purchaser.

Length of Title.

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I. A title more than 60 years old commenced by a general devise; a deed more than 60 years old recited the seisin of the devisor. Held, that that, coupled with the continued possession, was sufficient evidence of seisin.

II. A title is first shown, when the abstract states all the matters which, if proved, make a good title. A title is made, when the matters are proved.

III. Where a title commenced by a general devise, and seisin only proved as stated in proposition I., and there was ground to assume that the vendor had deeds earlier than those on the abstract. Held, the purchaser was entitled to inspection of those deeds, if in the vendor's possession; but not to have them on the abstract. Whether a purchaser is generally entitled to inspection of deeds earlier than a 60 years' title, *quære*.

THIS was a bill filed by the vendor, for specific performance of an agreement to purchase certain real estate called *Englefield Farm*, devised by *William Wearham* to his three daughters, and sold under the direction of the Court. The purchaser, *Lovegrove*, objected to the title, and the usual decree was made directing an inquiry whether the Plaintiff could make a good title, and if so, when such title was first shown.

The Chief Clerk certified that the Plaintiff could make a good title, and that it was first shown that such title could be made on the 14th October, 1856. The certificate had been signed by the Judge.

This was a motion by way of appeal, to discharge the Chief Clerk's certificate, or to vary it by inserting the 27th July, 1857, instead of the 14th October, 1856, as the time when a title was first shown.

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The objections were two : first, that there was not a good title ; and secondly, that if there was, it was not shown till the 27th July, 1857.

The abstract commenced, as to a moiety, with the will of *Mary Englefield*, widow, dated December, 1789, who devised all her real estate to her son, *Thomas Englefield*, in fee ; and as to the other moiety, under a general devise, dated 1794, by *Joan Sims*.

It was objected that this was not a sufficient root of title ; that it must be shown by evidence that the devisors were seised in fee at the time when they made their wills.

A deed, dated 5th June, 1790, was produced between *Joan Sims* and *Thomas Englefield*, reciting that *Joan Sims* was seised of one moiety of the premises in question, and *Thomas Englefield* was seised of the other moiety, and by that deed *Joan Sims* covenanted with *Thomas Englefield* for the production of certain deeds affecting the property. The Plaintiff relied on these recitals and the uninterrupted possession shown, as evidence of seisin in the devisors ; but the purchaser objected to their reception as evidence.

The next point was, whether the purchaser was entitled to call for an abstract of the earlier deeds, if any.

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The vendor contended that, assuming the seisin to be shown by the deed of June, 1790, a sixty years' title was shown, and that the purchaser was entitled to no more; and he refused to say whether he had any earlier deeds.

The purchaser insisted that a sixty years' title was not conclusive; that is, that the rule is only that a purchaser is bound to take a sixty years' title, if no earlier title can be shown. But that if there is earlier title, he has a right to see it, and to have the deeds.

A third objection was, that as to a certain *William Wearham*, on whose death intestate the title depended, he was not shown by sufficient evidence to have died intestate. On this point the evidence produced by the vendor was an affidavit of *John Parr*, the brother-in-law of *William Wearham*, who deposed that he was always on terms of great intimacy with him; that he believed he was never possessed of any personal estate; and was not worth 5*l.* at the time of his death. And he believed no administration to his estate had been taken out; that *William Wearham* lived and died in a lodging, in a court near *Queenhithe*, and after his death the deponent searched his lodging for a will, and could find none; and he believed he had never made any.

The purchaser insisted that this was not sufficient, and that the proper Ecclesiastical Court, where, if he had made a will, it would be found, or out of which letters of administration would have been issued, should be searched.

Mr. Glasse and Mr. Dart for the purchaser.

The whole title rests on the seisin of Mrs. *Englefield*

and *Joan Sims*. Their devises were general devises, with nothing whatever to show that they included this property at all. A purchaser is entitled to have an abstract, beginning with a deed conveying the specific land in fee; at least he is entitled to a specific devise identifying the land. Then it is said that the seisin is shown by the recitals in the deed of June, 1790. But those recitals are no evidence against strangers to the deed; and though length of time and possession is insisted on, that is no evidence of seisin in the party who is the very root of the title. If length of possession is to constitute title, it is of the very essence of that species of title to show seisin.

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Then with regard to the earlier deeds: a purchaser must take a sixty years' title we admit, when there is no longer title. But the principle of that rule is, that you *presume* that there is nothing to oust a sixty years' title; but if there are earlier deeds, they may actually show that the title is bad; and there is no rule that a purchaser is bound to take a bad title, or a title as to which there are materials to show that it may be bad because it is sixty years old. Suppose there are earlier deeds; if we complete, are they not part of our title—our property? The vendor can have no right to them; he is bound to deliver them up. If then we have, as complete purchasers, a right to them, have we not a right to see them before completing, as part of the title we are going to take? We do not say the purchaser is bound to *make* an earlier title, if he has none; but we say he is bound to answer whether he has any earlier deeds or not; and that if he has, he is bound to produce them.

Then as to the intestacy of *William Wearham*, it is

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clear that it is not proved by legitimate evidence. The evidence of *Thomas Parr* that *William Wearham* had no estate, and that he could not find a will, is but secondary evidence. The proper evidence of no will, is search in the offices where a will would be proved, or whence letters of administration would issue; and the vendor is clearly bound to make that search. [They referred to *Cooper v. Emery* (a).]

Mr. *W. W. Cooper*, (with whom was Mr. *Baily*.) for the vendor.

The proposition on the other side, as to the root of the title, is too wide. You need not commence the title with a deed, or even with a specific devise. You need not of necessity show any deeds at all, according to Lord *St. Leonards* (b); and it is obvious that that must be so: for if a man were seised sixty years back, and died recently without a will, leaving his heir to take by descent, could it be pretended, that seisin being proved, that would not be a good title? You begin with a deed, where you can find such a thing in the title, because that is one of the evidences of seisin. But if you cannot trace your title to a deed, but you do prove seisin, you make a good title. Here, as evidence of seisin, we have the recitals of the deed of 1790, and uninterrupted possession for more than sixty years. The recitals may not in strictness be binding, but, coupled with the possession, they afford evidence of the strongest kind. Then with respect to the earlier deeds: the demand made was to have them on the abstract; that is clearly a demand that cannot be supported. There would be no meaning in the rule, that, showing a sixty years' title is enough, if you are to

(a) 1 Phil. 388; 1 Jarm. (b) V. & P. 13th edit. 350. Conv. 63.

be called upon at the purchaser's fancy to deliver an earlier abstract. But we say the rule goes further : a sixty years' title is conclusive, and the purchaser cannot require inspection of any earlier deeds even if they are in existence. They are not necessary. The title is complete without them. What right, then, can the purchaser have to call for that which is immaterial to his title? As to the second point—the evidence of *W. Wearham's* intestacy—what better evidence can we give? What probability is there of administration to an estate proved to be not worth 5*l.*? and what probability is there of a will, when minute search in the only place where there was the least likelihood of finding a will, has been made? Such evidence as we have given would be sufficient to prove intestacy for obtaining money out of Court. To search for a will or administration in the Ecclesiastical Court would have been quite idle. No one looking at the position in life of *W. Wearham*, and the evidence, can have the least doubt of his having died intestate. [He cited *Prossor v. Watts* (a); *Lord Braybrooke v. Inskip* (b), and *Lord St. Leonards' V. & P.* (c), were also cited.]

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Mr. *J. H. Palmer* for other parties.

Mr. *Glasse* in reply.

The VICE-CHANCELLOR :

Several questions are raised in this case of rather a novel character; and it is singular that there is no express authority upon them, as they are questions which one would infer must have arisen again and again long ago.

Judgment.

(a) 6 Mad. 59.

(c) 13th edit. 364.

(b) 8 Ves. 417.

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The case comes on upon motion to discharge the Chief Clerk's certificate, made on a reference under a decree for specific performance. [His Honor took occasion here to point out that in general it was a more convenient and inexpensive course, when parties objected to the Chief Clerk's certificate, to take the objection before it was signed by the Judge; as the Judge would then hear the matter either in chambers or by adjournment in court, and give at once the necessary directions, instead of having to send the matter back into chambers.]

The inquiry under the decree is in the ordinary form, whether the vendor, in this case the Plaintiff, can make a good title; and if so, when a good title was first shown. That is the common every-day decree; and yet it is now in controversy, and there is no express authority on the question, what is meant by "when a good title was first shown?"

I confess I cannot say that I ever entertained any doubt as to the meaning of such a decree. The first inquiry, whether a good title can be made, means not only that the vendor shows on his abstract such documents and facts that if the documents are produced and the facts proved he has a good title, but that the vendor has shown that he can produce the documents and prove the facts; but as to the second branch of the inquiry, it means, when was a good title first shown on the abstract; and if, on the face of the abstract or abstracts delivered, the vendor has shown say a sixty years' title, and if for the purpose of supporting that title, it is necessary to show that such a person died intestate or any other fact,—if the facts are alleged with sufficient specification on the abstract,—

then that abstract *shows* a good title, although the proof of the matters shown may be the subject of ulterior investigation ; and no authority has been cited to show that that is not the meaning of the decree.

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In this case two questions are raised :—

1st. Whether a good title is made at this time ?

2ndly. If a good title is made, when was it first shown ?

And it is said for the purchaser, that a good title was not shown at the time when the Chief Clerk made his certificate.

As to the first question, the objections taken are these :—

1st. It is contended that the title is bad, on the ground that the root of the title is, as to a moiety, a will containing a general devise only, not a specific devise of the particular property, and as to the other moiety, a will of the same character ; and although those wills were made more than sixty years ago, that is not a sufficient root of title.

Now I find that, in some books of practice, it is suggested that an abstract ought to begin with a deed, and not with a will containing merely a general devise ; and it is urged that even a specific devise is not an eligible root of title. But there is no authority to show that a title must begin with a deed or a will by which the fee simple of the property specifically described must be vested in somebody. And, on the other

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hand, Lord *St. Leonards* says, you may even make a title without any deeds at all. Therefore, I do not think that the title can be considered to be bad on that ground alone. But, if the title does commence with such a document as we have in this case, there must be sufficient evidence of seisin; that is, in this case, that Mrs. *Englefield* and *Joan Sims* were seised of the property at the times when they made their wills. The evidence does not show that Mrs. *Englefield* was seised; but she purports to devise to her son *Thomas Englefield* in fee; and then, by a deed dated 1790, which was a deed of covenant between *Thomas Englefield* and *Joan Sims*, this was done.—[His Honor then proceeded to state the effect of the deed referred to in p. 171.]—By this deed they came to this arrangement, that *Thomas Englefield* should hold the deeds relating to the property at *Aldermarston*, giving a covenant to produce them, and *vice versa* Mrs. *Sims* should hold the title deeds of the *Englefield* property, giving a covenant to produce them. Now it appears to me that, taking that deed of 1790, coupled with the continued enjoyment from that time downwards, there is sufficient evidence of the seisin of *Joan Sims* and Mrs. *Englefield*, to constitute a sufficient title.

2nd. Another ground of objection is this. It is said that one of the persons through whom the title is derived, viz., *William Wearham* the grandson, is alleged to have died seised, subject to certain life estates, without issue, and leaving his father surviving; and if that is made out, then his father was entitled to the reversion in fee, and it is through him that the title is derived. But it is said: "You have shown that the grandson died seised, and without issue; and that his father was his heir-at-law. But you have not shown that he died intestate."

The answer is, "We show by the affidavit of Mr. *Parr*, the brother-in-law of *William* the grandson, that he lived in very humble circumstances; in an obscure apartment; and that he was not worth, at the time of his death, 5*l.*, and never had any property; and we show that *Parr* searched the apartment in which *William* lived, after his death, and found no will or instrument in the nature of a will; and he verily believes that he left no will." But, then, it is said, "You have not searched the Ecclesiastical Court where, if he had made a will, or, if his estate had been administered to, the probate or the letters of administration would have been found." And the question is, is the obligation of such a search imposed on the vendor? Now, if the question were simply, did *William* die intestate, I should come to the conclusion that he did. But that is not the simple question here; the question is, is the vendor bound to prove that he died intestate? and I think the onus does lie on the vendor to prove the intestacy.

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Then, what is the rule when a vendor is bound to produce evidence of a fact? Why, that he is bound to produce the best evidence reasonably within his reach. If there be obvious means of ascertaining the fact, and he can so ascertain it, the vendor is then bound to produce that evidence. I think, therefore, that, in strictness, the vendor is bound to produce evidence of a search in the Bishop's Court, or the Prerogative Court. But, I must say, I consider the point trivial, and I allow the objection with great reluctance.

As to the objections to title, therefore, I think there is sufficient evidence of seisin; but I must have the question of intestacy set right.

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Next; it is said the purchaser has a right to have inspection, and therefore production of any deeds that are in the vendor's possession, although they may be of an earlier date than the earliest deeds abstracted. It is singular that on that proposition also there is no direct authority. It appears to be the opinion of Mr. *Jarman* and Mr. *Hayes*, that it is the right of the purchaser to see any deeds relating to the property, that are not abstracted, although the abstract may show a good sixty years' title. Whether that is so or not, as a general rule, I must say that, considering the nature of this title, it is in this case the right of the purchaser.

Here the abstract does not commence by a conveyance showing the fee to be in the person who is the root of the title; nor even by a devise in fee of the specific property, but only a general devise.

It is only by the collateral evidence showing seisin and continued possession, that you can arrive at the conclusion that there is a good sixty years' title; in a case like this I think it just that the purchaser should have a right to inspect any earlier deeds in the possession of the vendor.

The question arises here particularly as to two deeds scheduled to the deed of covenant of 1790, viz., a lease and release of 1752, and the chirograph of a fine — .

As to those, *primâ facie*, they would be in the possession of the vendor. It is said, at the Bar, that they are not; but whether they are or not, is not in evidence; if they are, the purchaser has a right to see them.

Then comes the question, were they called for? They

were, but, I think, in ambiguous terms; they were required in such terms that I think the vendor was justified in concluding that it was insisted that they ought to be on the abstract; and, with that view, the vendor refused to produce them.

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I must however, I think, consider that the Chief Clerk came to the conclusion that there was no right to production, even for inspection. And the vendor probably, in consequence, was not required to make an affidavit of documents. I think it is the right of the purchaser to have inspection of any documents relating to the property which are in the possession of the vendor; but I do not decide at all that he has a right to have them abstracted; that is a very different thing. If the purchaser had a right to have deeds earlier than a sixty years' title abstracted, that would be quite independent of the question whether the vendor has them or not; it would amount to saying, that, if he cannot get them, he cannot make out a good title. But, though not bound to abstract them for the purpose of making out a title, I think he is bound to give the purchaser inspection of them to see whether they will throw any light on the title. [His Honor then went into a question as to a certain missing deed, and held that a good title was *made* when proof was produced of search for it, and of its loss. But that a good title in those respects had been *shown* on the abstract; and he then continued, with respect to the deaths of certain persons, whose deaths were essential links in the title:]—It appears to me that, when a fact essential to title is alleged on the abstract, then, and not till then, a good title is *shown*. Now, in this case, the vendor at first insisted he was not bound to show the deaths of these parties, and he did not allege them on his abstract till

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the 20th January. I think, therefore, that he did not *show* a good title till the 20th January; that is a question quite independent of the question whether there *is* a good title; the question is, when he first *showed* it, and I think he did not do so till the 20th January.

[The matter was therefore referred back to the Chief Clerk.]

[His Honor again took occasion to point out that, in such cases of objection to the Chief Clerk's decision, it should be brought before the Judge before the Chief Clerk's certificate is signed by the Judge, instead of waiting for it to be signed, and then appealing.]

NOTE.—The Court, it will be observed, abstained in this case from deciding whether generally, and irrespectively of the nature of the title shown, a purchaser has a right to inspection of deeds in the vendor's power earlier than a sixty years' title. *Prosser v. Watts*, 6 Mad. 59, the only case approaching the question, does not throw much light on it; for there the vendor had not the deeds in his power; and the question was, whether the purchaser, having by recital in a deed more than sixty years old constructive notice of antecedent deeds, could refuse the title, and the Court held that he could not. Mr. Jarman, in commenting upon that case, expresses the opinion referred to in the judgment in this case, that a vendor is not justified in withholding documents in his possession relating to the property sold, whether subsequently recited or not. And a consideration of the principle regulating the right of the purchaser to inspect deeds at all, and in particular of the principle on which a sixty years' title is held sufficient, appears to the writer to support Mr. Jarman's opinion.

It is perfectly clear that in general a purchaser on completing, is entitled to have delivered up to him the title-deeds,

assuming that they are in the vendor's power. His right to them rests on the fact that when he has become complete purchaser, the title-deeds are his; they are the evidences of his title, not of the vendor's, who has by the transaction ceased to have any estate or title. The right to *inspection* of any deeds as evidences of title rests on this, that the purchaser before he completes, has a right to see those evidences of title which are to be his if he completes; and that right must be commensurate with his property in the deeds after completion; that is, his right (putting out of view, for a moment, the rule about a sixty years' title) would be a right to inspect every deed that the vendor had, however old. The only question, then, is, does the rule of a sixty years' title abrogate or limit that right? Now, the rule of a sixty years' title never was founded on any assumption that it gave a title absolutely safe against eviction (*Hayes' Conv.* 281), it was a rule which, admitting that a title shown for sixty years might still be the subject of eviction, assumed that after sixty years there was a moral certainty that no facts existed which could support eviction. Again, the rule has never been so stated, as expressly to lay down that a purchaser cannot call for a longer title, if the vendor has it; but only that he cannot object to a title of that length, if the vendor has no better. The ground of the rule being, then, not that sixty years make a positively good title, but only that they raise an inference on which the Court will act, that there is, in fact, nothing that can disturb the title, how would it be consistent with that rule to say, that where evidence is proved to exist, (such as earlier deeds,) which may show the inference arising from a sixty years' title to be ill founded, the Court would still treat the inference as incapable of being rebutted, and refuse to allow the evidence which may destroy it to be investigated?

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Jan. 14, 15, 16.

Bankruptcy.
Trustee.
Assignee.

POOLEY v. QUILTER (a).

There is no positive rule, that a trustee cannot buy from his *cestui que trust*; nor that an assignee in Bankruptcy may not buy from a creditor his dividends. But where an assignee bought from a creditor, not in his own name, but in the name of a stranger, and it was not clear that the creditor knew he was selling to the assignee, the Court directed further inquiry.

THIS was a bill by *Pooley*, a creditor, against the estate of *G. Hennet*, a bankrupt; against *Quilter*, *Burge* and *Pryor*, creditors' assignees; *Cannan*, official assignee; and against *Whidborne* and *Brunskill*. And it sought to set aside a purchase of the dividends due to the Plaintiff made by *Whidborne* in his own name; but, in fact, for himself, *Quilter* and *Brunskill*.

The facts of the case were as follows:—*G. Hennet* became bankrupt in 1853, and the persons above named were his assignees. Mr. *Quilter*, one of the creditors' assignees, was a member of a firm of accountants of eminence in the city of *London*, and previously to the bankruptcy had been employed by the bankrupt in reference to his accounts. The Plaintiff *Pooley* was the holder of bills of exchange to a large amount, viz., about 33,000*l.*, on which, or on some of which, the bankrupt was liable to him; he claimed to stand as a creditor for the whole amount. It appeared that previously to the bankruptcy, *Pooley* had been desirous to sell his interest. When the bankruptcy took place, the claim of *Pooley* was objected to by the assignees, or by *Quilter* on their behalf, as to a portion of the demand, as to which it was alleged that the estate was not liable; but from the statement of the Plaintiff himself, it appeared, that previously to the 25th October, 1853, it had been agreed, that to the extent of 23,430*l.* 1*s.* 2*d.*, he should

(a) This case was in print before the appeal in it was heard; and as the reporter is informed that the case will be carried to the House of Lords, he conceives it will still be useful to report it.

be admitted to prove. It appeared, also, that previously to October, 1853, several interviews had taken place between *Pooley* and *Quilter*, and in some of these interviews *Pooley* had given *Quilter* to understand that he, *Pooley*, was desirous of selling his claim; that wish being communicated to *Quilter*, *Quilter* said, that at first he rejected it; but, according to the Plaintiff's statement, in the course of these interviews, *Quilter* said, if *Pooley* would put down his views in writing, he, *Quilter*, thought he had an acquaintance who would buy. On the 25th of October the Plaintiff wrote to *Quilter*, and, referring to the arrangements already made, went on to state his wish to sell his claim in respect of the 23,430*l.* when paid, for 7,000*l.*, on condition, that if the amount of the dividend exceeded 8*s.* in the pound, then the surplus should belong to him, *Pooley*. Eight shillings in the pound would be about 9,000*l.*, and *Pooley* was willing to sell his interest on those terms. On the same day, *Quilter* forwarded the letter to *Whidborne*. *Whidborne* had been the solicitor of the bankrupt, not the solicitor of the Commissioners; and he had more or less of knowledge of the affairs of the bankrupt. It did not appear that *Quilter* communicated to *Pooley*, that *Whidborne* was the person who was to be the purchaser.

Whidborne came to town on the receipt of *Quilter's* letter, and an interview took place between *Pooley* and *Whidborne*, at which it was agreed that *Whidborne* should be the purchaser of the dividends to the extent of 8*s.* in the pound, and that beyond 8*s.* in the pound they should be retained by *Pooley*, and an assignment was prepared and executed, dated the 1st of November, and that recited that the money was paid; but it was,

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in fact, arranged, that 5,000*l.* should be paid when the payment of a dividend was made.

So matters remained till February, 1854, and then *Mackenzie*, the partner of *Whidborne*, wrote a letter to *Pooley*, proposing to be the purchaser of the excess of the dividends beyond 8*s.* in the pound. That arrangement took effect, and on the 3rd of April, 1854, there was an agreement between the parties. A second dividend of 2*s.* 6*d.* had been declared previously to that transaction : so that by the dividends of 2*s.* 6*d.* and 5*s.* in the pound, there had been 7*s.* 6*d.* paid, and that was previous to the second transaction of the 3rd of April, 1854.

On the 26th of May there was a further agreement between *Pooley* and *Whidborne* as to further proof. In September or October, 1854, a third dividend of 1*s.* 3*d.* in the pound was declared, so that by that time the dividend had exceeded 8*s.* in the pound. It now appeared, that although, on the face of the transaction, *Whidborne* alone was the purchaser, as to half he was purchasing for *Quilter*, and as to one-third of the remainder for himself, and as to the remaining two-thirds of a half for Mr. *Brunskill*, one of the Defendants.

Mr. *Glasse* and Mr. *De Gex*, for the Plaintiff.

This is, as to *Quilter*, a purchase by an assignee of the dividends of a creditor, one of his *cestuis que trust* ; that clearly, as to any interest of his in it, cannot be supported. Indeed he has given it up ; but then it is said he can maintain it for the estate. Now, in what does his position differ from that of an executor pur-

chasing the legacy of a legatee? and it has been decided that that cannot be supported for the benefit of the estate: *Barton v. Hassard* (a): on principle it cannot be. This is a case of legal fraud. We do not charge *Quilter* with any personal fraud, but a purchase by a trustee of his *cestui que trust* is a case of legal fraud, and cannot be supported for his benefit; how, then, can it be supported for the benefit of another? How can that which is fraud in him enure as no fraud for the benefit of another? The whole transaction is tainted with fraud, and is therefore void: *Ex parte James* (b); *Ex parte Bennett* (c). Then, as to *Whidborne*, he was the solicitor of the bankrupt, and knew all his affairs. He was the friend of *Quilter*, and had the benefit of all *Quilter's* knowledge; the transaction as to him is affected with *Quilter's* liability. As to *Brunskill*, we cannot show that he had any knowledge; but still, the transaction, having its inception in fraud, is altogether worthless, and he cannot take advantage of it.

Mr. *Swanston* and Mr. *Giffard* for the Defendant *Quilter*.

The rule is misstated. There is no rule that a trustee may not buy from his *cestui que trust*; the rule is, that if he buys, it lies on him to show that the transaction was fair; here we do show that. There is no case in the books in which a purchase by a trustee has been set aside merely on the ground that he is a trustee, except where he is a trustee for sale. The rule is, that he cannot buy of himself, not that he cannot buy from his *cestui que trust*. You must show that the transaction was unfair to set aside a purchase from a trustee

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(a) 3 Dr. & W. 461.

(c) 10 Ves. 380.

(b) 8 Ves. 337.

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from his *cestui que trust*. *Pooley* was anxious to sell ; he sold in fact for a good price ; he wanted money down, and he had it. There was no pretence of under-value or deception ; he must have known, and in fact on the evidence did know, that *Quilter* was a purchaser. But we do not seek to support the purchase for *Quilter's* benefit ; he gives that up. But we say he can maintain it for the body of the creditors. He was trustee for a body ; he represents that body, and may buy for them. Can it be pretended that if *Pooley* had sold to the other creditors, that could not have been supported ? Well then, *Quilter* represents the other creditors, and may buy of *Pooley* for them.

They cited *Ex parte Lacey* (a).

Mr. *Baily* and Mr. *Wickens* for *Whidborne*.

Mr. *Shapter* for *Brunskill's* representatives.

The VICE-CHANCELLOR (after stating the facts set forth in p. 184 *et seq.*)

Judgment.

Now the first question in this case is, what is the ground on which the Plaintiff seeks to impeach this transaction ? It is obvious that an assignee in bankruptcy must have much greater means of knowledge than a person in the situation of a creditor, and it must be known by every creditor that he has such means of knowledge ; firstly, as to the probable amount of the estate, as to the nature of the assets, and the debts due ; secondly, he must have better means of forming a judgment as to what debts can be realised against the estate

(a) 6 Ves. 625.

and as to the period which must elapse before realisation of the assets. And on all these matters depend the value of the creditors' claim; and, therefore, the Plaintiff, in dealing with *Quilter*, dealt with a person having much superior means of knowledge to himself.

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On the other hand, it is clear that *Pooley* was himself a man of business. He knew that *Quilter* had greater means of knowledge in his capacity of assignee; supposing him to have known that he was dealing with *Quilter*. Now, there is no fixed rule that a trustee may not purchase from his *cestui que trust*. If a trustee is a trustee for sale, then, indeed, he cannot purchase from his *cestui que trust*, as long as the relation of trustee and *cestui que trust* lasts. So, if a trustee has superior means of knowledge by reason of his office as to the value of the property, and deals with his *cestui que trust*, who does not know it, then also the trustee cannot purchase.

But the naked rule, that a trustee can under no circumstance purchase from his *cestui que trust*, cannot be maintained. Take the case of a trustee to preserve contingent remainders; he may clearly purchase. So, if an estate is vested in *A.* in fee in trust for *B.* in fee, it is quite obvious that *B.* may sell to *A.* A solicitor is not absolutely precluded from purchasing from a client, but in such a case the Court looks at the transaction with great jealousy. Perhaps the strongest case that could be put for applying the naked rule would be that of assignees, because they have the greatest means of knowledge in dealing with the creditors, and of availing themselves of their position as trustees or assignees. But still, where the creditor or the party dealing with the assignee is adult, where no undue in-

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fluence has been exercised, there is no reason why a creditor may not deal with an assignee, or why, in other words, an assignee is disqualified from dealing with a creditor. The other question, whether the assignee may purchase for himself, or for the benefit of himself, is a distinct question. Let it be assumed in the present case that *Pooley* the Plaintiff was dealing direct with *Quilter* the assignee. I know of no rule which would entitle the Plaintiff to say (not alleging any concealment or undue influence), "although I knew whom I was dealing with, the transaction must be set aside," merely because the party purchasing was the assignee of the estate of which the vendor was a creditor. Now in the present case there is no suggestion that there was any misrepresentation on the part of *Quilter*, nor is there any suggestion that there was any concealment intentional or unintentional of any fact known to him which ought to have been communicated to the Plaintiff. It was suggested that *Quilter* knew that it was probable that there would be an early dividend, but it seems to me that that does not appear. It is not suggested that there was any undue exercise of power on the part of the assignees, or any inadequacy in the amount of the purchase-money; it is not suggested that more could have been obtained. It is true what was paid was less than 8*s.* in the pound on the sum of 23,442*l.* 11*s.* 9*d.*, only in fact 6*s.* in the pound was paid; but it was equally known to the vendor and purchaser, that the probability was that the dividend would exceed 8*s.* in the pound, and indeed it was 8*s.* that was recited in the assignment. Can it be said that that 2,000*l.*, which was the amount of the purchase-money, was an inadequate sum for the chance which the purchaser was buying? There appears to me to be no such extrinsic circumstances amounting to misrepre-

resentation or undue exercise of influence on the part of *Quilter*, in the character of assignee, nor such inadequacy of price as to induce the Court to say that the transaction ought not to stand, and therefore if it had been a case of direct sale and assignment from the Plaintiff to *Quilter*, it appears to me that I should be under the necessity of saying (much as I disapprove of an assignee purchasing from his creditor), that the Plaintiff at least is not the person who has a right, being adult and *sui juris*, to set the transaction aside. The most important point, however, is now to be considered. I have hitherto supposed that it was a direct transaction between *Pooley* and *Quilter*; but suppose it was not, and that *Pooley* conceived he was dealing with *Whidborne*, and that after he had sold and the transaction was completed, that is, say in 1856, he had discovered that he was dealing with this *Whidborne* as an agent and trustee for *Quilter*, then, indeed, the case presents a very different aspect; and if I should come to the conclusion that *Pooley* was not aware until after the transaction was completed that *Quilter* was beneficially interested in the purchase made apparently by *Whidborne*, he could not maintain that as against *Pooley*, and if so, the assignee of the general creditors would have no right to do so. How then does the matter stand on that point on the evidence? *Quilter's* representation is that he never told *Pooley* that he was interested, and it certainly was very remarkable that he should not have told him. He might certainly not have mentioned it, because he took it for granted that he (*Pooley*) knew it. If anything had been said involving the necessary inference that *Quilter* was interested, that would have been a different case. But on the face of the transaction there was nothing to show that any one had any interest but *Whidborne*.

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*Quilter* says that there having been several interviews between him and the Plaintiff, he the Plaintiff offered to sell to him (*Quilter*). That circumstance was quite consistent with the possibility of the fact that the Plaintiff did not know it. Then it is said that the transaction took place at *Quilter's* office, and then came the negotiation by *Mackenzie* with the Plaintiff for the subsequent assignments, and in all these it is very remarkable that no one ever told the Plaintiff that *Quilter* was interested. *Mackenzie* said that he would agree to nothing until he had consulted with *Quilter*, and that is the strongest ground for supposing that the Plaintiff might have known the fact that *Quilter* was interested; but although that is a probable ground for supposing that the Plaintiff did know the fact, still it is quite consistent with the possibility that he did not. Now Mr. *Taylor*, in the letter which he wrote upon the subject of the discovery of the interest of *Quilter*, does not say that the Plaintiff did not know that fact, and it is said that that affords an inference that the Plaintiff did know it; and I admit that if there were no means of arriving at the truth except by inference, that there might be some force in that argument. The Plaintiff might consider it of no importance, or Mr. *Taylor* either. There is then a question whether that letter was not qualified by *Quilter's* answer, and it certainly was so far qualified that the inference is that *Pooley* did not know the fact; but all these things are not inconsistent with the fact that *Pooley* did not know that *Quilter* was interested in the purchases. But we have the unequivocal oath of *Pooley*, that until the month of May, 1856, he was not aware that *Quilter* was interested. I shall not, however, decide the fact on the evidence as it at present stands. The affidavits were made at the last moment, and I have everybody here

from whom the fact could be elicited. The question, then, is, how I can best get at the fact? There are three modes: first, by cross-examination; in which case an inquiry would have to be directed, and the cross-examination would be taken in chambers, that is one mode. Another mode is now to examine the parties in court *viva voce* under the new practice; and a third mode is to send an issue to a Court of Law, where not only will the parties be examined and cross-examined personally, but it will be tried by that tribunal which is considered the best to judge of the truth. I think I shall best accomplish the ends of justice by sending it to an issue, a jury being the best tribunal for such matters. Then, with regard to the case of *Whidborne*, it is clear that the Plaintiff knew that he was the solicitor of the bankrupt before the bankruptcy, and if it was a question between *Pooley* and *Whidborne* alone, there is no question that the Plaintiff could have no relief as against him; but if the transaction as to *Quilter* ought not to stand, the question is whether the Plaintiff is entitled to set aside the transaction as to *Whidborne*? It appears to me that he is not. The same observation applies to *Brunskill*, who was, as I understand it, only interested in the first transaction. The bill must, therefore, be dismissed against *Whidborne*, and the executors of *Brunskill*, with costs. But supposing that the Plaintiff should succeed as against *Quilter*, and be entitled to have costs as against him, those costs of *Whidborne*, so far as he was acting as trustee for *Quilter*, must have to be paid by the Plaintiff, who will be then entitled to recover them back from *Quilter*. The Plaintiff must, therefore, pay *Whidborne's* costs, reserving the question whether he may be entitled to recover them back from *Quilter* (a).

(a) This case was in print before it was heard on appeal.



1857.  
 July 3, 4,  
 and  
 August 1.

*Inheritance Act.  
 Bastard.  
 Descent.*

A domiciled Scotchman had a son born in Scotland before marriage, and afterwards married the mother in Scotland. The son died seised of land in England, leaving his father surviving. Held, that the father did not inherit from the son.

**Re DON'S ESTATE.**

**T**HIS was a petition by *David Don*, the father, praying for payment out of Court of a sum of money which had been paid in by the Corporation of *Newcastle-upon-Tyne*, as the purchase-money of certain real estate of which *David Don*, the son, had died seised, and of which *Don* the elder had taken possession on the death of his son intestate and without issue, as his heir.

*Don*, the elder, a Scotchman, and domiciled in *Scotland*, had cohabited in *Scotland* with *Elizabeth Hogg*, and by her had a son, *David Don* the younger, born in *Scotland* in 1818; in 1819 *Don* the elder married *Elizabeth Hogg*; and, by virtue of that marriage, *Don* the younger became the legitimated son of his father for the purpose of inheriting or transmitting by descent lands in *Scotland*, as well as for other purposes.

*Don*, the younger, came to *England*, and there purchased the land in question of which he died seised. *Don* the elder claimed to be his heir-at-law, and, as such, entitled.

*Mr. Anderson* and *Mr. Toller*, for the petition.

*Don* the younger was legitimate in *Scotland* for all purposes; that is beyond question; being legitimate in *Scotland*, the country of his origin, he is legitimate in this country clearly as to personal *status*. We cannot contend that, as an *ante natus*, he would have been able

to inherit land before the Statute of Inheritance; but that is not the question, the question is, can his father inherit from him? and that is dealt with by the Act; the 6th section, on which the whole question turns, makes the father capable of inheriting from his issue. Now, clearly, *Don* the younger is his father's issue, and his father's legitimate issue; he could take personality as such, that is not denied; but he could not do that if he were not legitimate issue. If, then, he is legitimate issue of his father, by the very words of the statute the father may inherit from him. The statute does not say, may inherit from his issue *born in wedlock*, but from his issue. So the word ancestor in the 6th clause shows the intention; it is not there used in its strict technical sense, as ancestor with relation to heir, but as progenitor—and *Don*, the elder, is the legitimate progenitor.

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Re

*DON'S ESTATE.*

*Mr. Lee* and *Mr. Wickens*, with whom was the *Attorney-General*.

We agree that the law of legitimacy applies to *Don* the younger, and makes his personal *status* here legitimate. But a claim to inherit land in *England* must be determined by English law, which is as old as the Statute of Merton, and requires that the party shall be born *ex justis nuptiis*. A child born out of wedlock cannot be heir, nor have any heir, except his own issue, *Doe d. Birtwhistle v. Vardell* (a) decided that a *post natus* son could not inherit from his father. Why? because there is no inheritable blood between them, and the converse follows from that case, that a father cannot inherit from his *post natus* son (b).

(a) 5 B. & C. 488; 2 Cl. 484; 2 Black. 247; 2 Inst. & Fin. 895. 93; Glanv. Ab. 7, cap. 13;

(b) They cited 1 Black. Co. Litt. 3 B.

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Now, it is said, that the Act makes an alteration. In what does that appear? The Act is dealing with the inheritance to land, and must be read with reference to the rules of law as to land. Where, therefore, the Act uses the word *ancestor*, and *issue*, it uses those words in the sense of ancestor and issue of *inheritable blood*, according to the pre-existing law. You must not attribute to the words a new sense, unless a new sense is clearly given to them; and there is no indication in the Act of intending to repeal the rule that a bastard has no inheritable blood. In other sections, where a given rule of the old law is altered, it is so in express terms. In the 6th section the capacity of the father to inherit from his issue, means from such issue as have inheritable blood. Therefore the Petitioner cannot show title to the money in Court.

Mr. *Baily* and Mr. *Chichester*, appeared for the Corporation.

Mr. *Anderson* replied.

[*Champion v. Edwards* (a), *Smith v. Adams* (b), and *Munro v. Munro* (c), were also cited, and an unreported case, *Reid v. Keith*, noticed in the judgment, was also brought to the attention of the Court.]

The VICE-CHANCELLOR.

Judgment.

The question in this case is, whether the Petitioner is entitled to a certain sum of money paid into Court by the Corporation of *Newcastle* under the Lands Clauses Consolidation Act.—[His Honor then stated the facts.]—The question is, what is the law as applied to these

(a) 2 De Gex, M'N. & Gor. 712.  
Gor. 202.

(c) 7 Cl. & Fin. 842.

(b) 5 De Gex, M'N. &

facts. I have considered this case with great deliberation, not merely on account of its novelty, but of its importance ; not that the facts of this case are likely very frequently to occur, but because the question is of great importance with reference to certain points affecting the rules of the law of inheritance to land in *England*.

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I may say, at the outset, that I have found almost an entire absence of precise authority on the question. The Petitioner insists that, on the death of *Don* the younger seised of land, intestate and without issue, the land descended on his father, *Don* the elder, as heir under the Inheritance Act, 3 & 4 Will. 4, c. 106. The Crown insists that *Don* the younger died without heirs, and that the land escheated to the Crown. The question ultimately turns on the effect of the statute ; and before considering that Act, it will be expedient to advert to some points as preliminary to the consideration of the Act itself.

The first question is with respect to the personal *status* of *Don* the younger, as to his quality of legitimacy or illegitimacy ; that is, was he the legitimate child of *Don* the elder ? Does the law of *England* regard him as the legitimate son of his father ? It appears to me that on the authorities applicable to this question, the principle is this : that the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin. If he is legitimate in his own country, then all other civilized countries, at least all Christian countries, recognize him as legitimate everywhere. Questions may arise, and have arisen, whether the law which is to determine the legitimacy or illegitimacy, is the law of the country where the individual was born, or the law of

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the country where the parents intermarried, or the law of the country of the domicile of the parents? and if the domicile of the parents was different, whether the law of the father's or of the mother's domicile governs? If it were necessary for me to determine these questions I should hold that the law of the father's domicile governed.—[His Honor referred on this point to *Munro v. Munro* (a).]—In this case, *Scotland* was the country where both parents were domiciled, where the child was born, and in which the marriage took place. In *Scotland*, then, *Don* the younger was clearly a legitimate child; and in *Scotland* not only was he capable of taking personal estate, but he was capable of taking real estate by inheritance; and the rule of law is, that if he is legitimate according to the law of that country, his personal *status* here is that of a legitimate son. It would not however follow, because he is a legitimate son, that he would, according to the general law, irrespective of the Act of Parliament, inherit land in *England* of which his father had died seised. On the contrary, according to the law of this country, there are certain rules and canons of the law of inheritance as to real estate, which, irrespective of personal *status*, are annexed to the nature of real estate, and which would prevent *Don* the younger from inheriting. That question arose in the case so much commented on of *Doe d. Birtwhistle v. Vardell*.—[His Honor stated the nature of that case, and proceeded.]—Now that case proceeds on this principle, that, admitting the legitimacy, more was required by the law; and that such are the rules of law as to real estate, as to preclude such a son from inheriting. *Don* the younger clearly could not, as the law stood before the Inheritance Act, although legitimate,

(a) 7 Cl. & Fin. 843.

have inherited land in *England* as heir to his father. And here I may observe that the ground of the decision was that, irrespectively of the question of personal *status*, there are by the law of this country certain rules of inheritance attached to land which cannot be departed from. Now I have been unable to find any authority deciding, previously to the act, the converse case to *Doe v. Vardell*, that is, deciding the question whether a collateral relative of *Don* the younger (*ex. gr.* an uncle or a *post natus* brother) could have inherited to him; but I apprehend that if that question had arisen before the Act, it would have been decided that no person, except his own issue, could have inherited to *Don* the younger. I have searched in vain for any authority, but it appears to me to rest on the general principles laid down in all the text-books, and all the authorities, in reference to the rules of inheritance. A person in the condition of *Don* the younger is always spoken of in the books as a bastard in its pure technical sense, that is, one who was born not in lawful wedlock; and it is clear that none but his own issue can inherit to a bastard. I assume that proposition as the basis of the conclusion at which I arrive. I assume that although *Don* the younger, being legitimate according to the law of *Scotland*, is legitimate all over the world, at any rate in this country, yet, by the law of inheritance of this country, not only he could not succeed by inheritance to his father or to any other person, but no one could succeed to him by inheritance, except his own issue.

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I proceed now to consider what is the effect of the Inheritance Act; but first I must refer to certain well known rules of the law of inheritance, quite distinct from those that I have hitherto been considering, which existed at the time of passing that Act.

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1st. If a person seised of land devise it, giving some estate expressly by devise to *A. B.*, a stranger, *A. B.* took by purchase and not by descent. But if *A. B.* were the heir of the devisor, he would take by descent.

2nd. The rule between brothers was that the descent was immediate; it was not traced through the common ancestor, but by a rule *positivi juris* the inheritance was immediate; it was one descent.

3rd. Land could not ascend to any lineal ancestor, to the father, or to any earlier progenitor in the direct ascending line; it should rather escheat to the lord.

4th. No relation of the half-blood, however near, could inherit; the land should rather escheat to the lord.

5th. In the case of blood corrupted by attainder, not only no person could inherit from, but no person could inherit through the person whose blood was corrupted; the land should rather escheat to the lord.

Now, having adverted to those five rules, and there were others of less importance which I have not noticed, let me observe on the Act. What are its purposes, its intention? The Act does not contain any preamble, and I am obliged, therefore, to collect its general intention from the enactments; and, after carefully reading it, it appears to me clear that the purpose of the legislature in passing that Act was this: there were several rules of law as to the inheritance of land (some of which I have above mentioned), which, however justified in the origin by reference to the feudal law, were not, in the opinion of the legislature, based on principles of natural justice, and were therefore productive of mischief; and

the object of the legislature was to alter those rules, but only so far as was necessary to cure the mischiefs which existed. Now it will be found that the principal sections of the Act apply themselves to the cure of the particular mischiefs arising from the rules that I have enumerated. Take the first of these rules: the 3rd section was framed for the purpose of curing that mischief. Then take the 2nd rule, the 5th section applies itself precisely to that; then the 3rd rule, the 6th section applies to that; and the 4th is met by the 9th section; and the 5th by the 10th section. I cannot doubt then this, that the intention of the legislature was only to cure the mischiefs arising from those rules to which I have alluded, and from certain other rules of the law of inheritance existing at the time of the passing of the Act; and I am satisfied that the general intention of the legislature was not to make any difference in that rule which prevented a person not born in lawful wedlock from inheriting, and from transmitting by inheritance except to his own issue. The legislature did not address itself to that question, and there is nothing in it which refers to that question. The legislature meant to leave the law as to persons in the relation of *Don* the younger in the same position as it was before.

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 Re  
 DON'S ESTATE.

But the contention rests entirely on the language of the 6th section. It is only by virtue of that section that it can be contended at all that *Don* the younger can transmit an inheritance to his father or to any collateral relation.—[His Honor referred to the first clause of the 6th section.]—Now the word “ancestor” here is clearly used in the popular sense. The word has two meanings; it may mean (and that is its popular sense) progenitors. That is the sense in which it is used here. Its technical sense is that in which it is put in opposition to “heir;” in which sense a younger brother may



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be the ancestor of his elder brother; that is, if *A.* is the heir of *B.*, *B.* is in that sense the ancestor of *A.* But in this clause the word is clearly used in the popular sense of progenitor in the direct line. Now that clause enacts that an ancestor shall be capable of being heir to any of his issue; and it is argued that as *Don* the younger is a legitimate son, he is the issue of his father; and if he is his father's issue, his father is his lineal ancestor, and therefore it is said the case is within the 6th section. That is the argument; and I confess I was struck with it, and felt at first some doubt whether it was possible to escape from it; but it appears to me, on consideration, that the argument is not tenable.

In what sense is the word *issue* used in the sixth clause? for that is at the root of the question. One rule for interpreting any word in a written document is, that if you find a word clearly used in a given sense in one part, you *primâ facie* conclude that the intention is that it is used in the same sense in another part; *à fortiori*, if I find the word used in a given sense in one clause of a section, I should conclude that the word is used in the same sense in another clause of the same section. Now in the sixth section the word *issue* is used twice.—[His Honor referred to the language used in the second clause of the section.]—In what sense is *issue* used there? It appears to me clear that the word *issue* there is intended to mean issue capable of inheriting according to the law of the country. Suppose *Don* the younger being domiciled in *Scotland* had followed his father's example, and had a son born in *Scotland* out of wedlock, and then married in *Scotland*, that child of *Don* the younger would have been in *Scotland* his legitimate son, and being legitimate in *Scotland*, he would be legitimate here. Then suppose *Don* the younger, having no *post natus* son, died seised of land in *England* which he

had purchased, leaving his father surviving: now if issue here means any issue, whether capable of inheriting or not, *Don* the elder could not inherit to his son by the very terms of the clause, for the father could only inherit if the purchaser left no issue. But here it is contended that he did leave issue. Then, if it could not go to the father, could it go to the son of *Don* the younger? Certainly not, because he was not issue born in wedlock. And there is nothing in this Act that says that a bastard child shall inherit. Then the result is, that the land would escheat. Why, that was the very evil intended to be cured. It was not meant that it should go to a bastard child, but it was meant that it should go to the family rather than back to the lord. The question is, then, whether you must not introduce into the construction of the word *issue*, issue capable of inheriting, and that I think is clearly necessary. Then, if I find that the sense of issue in that clause, I must conclude that it is used in the same sense in the first clause in speaking of capacity to inherit. And then the language will run thus:—Every lineal ancestor shall be capable of being heir to any of his issue capable of inheriting from him.

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There is another reason which in the consideration of this Act has brought me to the conclusion that I have arrived at. The second clause of the section points out in what order the lineal ancestor takes; and it is in effect this:—If the purchaser dies leaving issue, that lineal descendant shall be the first person to inherit; but if he dies without issue of his own body, then, before any collateral, the father shall take. That is the effect. Now, in what manner is that worked out by the words used in order to determine the place in which the father is entitled? It adverts to the position of the persons who according to the law in force at the

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passing of the Act would have been entitled. The father is to come next before the brothers, who before the Act would have been the persons to take in default of issue. Now, take this case :—Suppose *Don* the elder, after his marriage with the mother of *Don* the younger, had had children by that mother, who would have been strictly by our law legitimate, and capable of inheriting to their father as *post nati*; if I am right, then supposing *Don* the younger had died seised of lands in *England*, the *post nati* could not have inherited from him. Then suppose that state of things, where does the Act say that *Don* the father shall come in? why next before and in preference to any person who would have been entitled to inherit. Then, where is the father to come in? why, next to nobody, for before the Act nobody would be entitled to inherit. Besides, if *Don* the elder was entitled to inherit, why of course his *post natus* son, supposing the father to be dead, ought also to be entitled. But there is not a word in the Act to enable the *post nati* brothers to inherit from *Don* the younger.

It appears to me that, upon the construction of this Act, I cannot find an intention to make any alteration of the law of inheritance, except in so far as the Act has clearly expressed it. And looking at the sixth section, I cannot find that it was the intention of the legislature in that section to affect the question as to the right an individual in the position of *Don* the younger to inherit or to transmit inheritance; and when I examine the particular language used, I find the word issue used in a sense which I think confines it to issue capable of inheriting; there is no alteration, therefore, in the rule that precludes a person born out of wedlock from inheriting land, and precludes any person from inheriting from a person born out of wedlock.

[His Honor then referred to a case of *Reid v. Keith* (not reported), in which, when he held the office of Master, he had found, in reference to a person named *Black*, who was *ante natus*, that his *post natae* sisters were his heiresses of land in *Canada*; the law of inheritance in *Canada* being in that respect the same as in *England*; and the cause coming on for further directions before Vice-Chancellor *Knight Bruce*, he expressed an opinion, in the absence of the Crown, that the conclusion was right, but desired that the Crown should appear, and directed the *Attorney-General* to be served; then it appeared that the land was of no value, and the Crown, whether on that or on some other ground, declined to interfere. The result was, that the case did not appear to have been so argued that the Court could treat it as the deliberate opinion of Vice-Chancellor *Knight Bruce*.]

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*Re* ROYAL BRITISH BANK.

BROCKWELL'S CASE.

THIS was an application by the official manager to put Mr. *Brockwell* on the list of contributories.

The facts of the case were in detail very complicated, but as matter of foundation for the decision they came in substance to this:—

The bank was formed in 1849; from the time of their original formation the directors made, in the usual manner, annual reports, but those reports, from the very first, falsified the accounts of the company,

were seen by *A.*, who, on the faith of them, took new shares created by the company. Held, that the fraudulent reports of the directors were the reports of the company, and *A.* was not properly made a contributory.

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July 18, 22,  
and  
August 5.  
Company's  
Fraud.  
Contributory.

The directors of a company, by their reports, grossly misrepresented the state of the company. Those reports got into circulation, and

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and represented it as in a more flourishing condition than it really was. In December, 1854, the company being in a totally insolvent state, the directors prepared a report, which was presented at the annual meeting of the 2nd of February, 1855, totally misrepresenting the state of the company, in putting down as assets a large amount of bills dishonoured and known to be hopeless, and otherwise representing the company as in possession of capital and flourishing, when in fact all, or nearly all, its capital had been wasted, and it was utterly insolvent. In February, 1855, the directors obtained from the Board of Trade a supplemental charter, authorizing the company to create new shares. This charter had been obtained on false representations to the Board of Trade, as to the state of the company, and the deed was not signed by all the shareholders, nor was half the amount of each subscribed share paid up. The report of February, 1855, was published in the newspapers, and was to be seen at the office of the company, and there Mr. *Brockwell* saw it; it did not appear whether he had also seen it in the public newspapers, but he himself, in his affidavit, said that he took shares on the faith of that report.

In March, 1855, he took three shares; he paid up his capital, and received dividends, and it was not disputed that his contract to become a shareholder was complete, if it was not avoided by the fraudulent representations of the directors. In the winding-up of the company, the official manager proposed to put Mr. *Brockwell* on the list of contributories, which he resisted, on the ground that he had been induced to become a purchaser by fraud, by a representation of the company, by their agents the directors, that the company was substantial, when it was in fact wholly insolvent.

There was nothing to show that the original shareholders, as a body, had participated in the frauds of the directors; on the contrary, there was reason to conclude that they were deceived as well as the new shareholders. The remaining material facts appear in the arguments and the judgment.

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*Sir F. Kelly*, for the official manager.

[The learned Counsel first referred to the annual reports of the directors, and particularly to the report made in February, 1855, of the state of the company at the end of December, 1854, and he admitted that that report greatly misrepresented the state of the company's affairs, representing it as flourishing, when it was in fact entirely insolvent.]

Now, it is said, that if the affairs of the company had been truly stated, it would have appeared that the company was largely indebted; but the question is, how is this fact to be made a ground for *Brockwell* avoiding his contract. I admit that the reports got into circulation, and that they got into the newspapers, but it is not proved that *Brockwell* saw them in the newspapers; what he says himself is, that when he went to the bank he saw some of these reports, and that is all. Now it is not disputed that *Brockwell* was and is a shareholder, unless he is released from being so by the effect of the misrepresentations. His argument is, that he was induced by fraud to purchase his shares; but to support that, he must show that it was a fraud by the company. Now this was not a misrepresentation made by the company, or any person acting by their authority; it is not a report issued by the company, nor even a report issued by the directors to the public, but a report made by the directors to the then existing shareholders, and

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to them only. It is said that because it got into the newspapers, it was a misrepresentation to the public; but that does not touch the real question, you must show that it was a representation made by the *company*, or *by its authority*, and that the new shareholders saw it, and were induced by it to take their shares. Now it will be said that the directors were the agents of the company; and so they were, for the purpose of doing all *lawful* acts, but not for the purpose of committing a fraud. If you show a man to be my agent, no doubt he may bind me to all lawful acts, but if he commits a fraud, I am not bound by it, unless you show that I gave express authority to commit the fraud. [He cited *Dodson's Case* (a), *Ex parte Barnard* (b), *Bell's Case* (c), *Ginger's Case* (d), and distinguished the last two cases from the case before the Court.]

With him Mr. *Glasse* and Mr. *W. D. Lewis*.

Mr. *Brockwell's* contract as a shareholder was clearly complete; he received dividends, and if the concern had been profitable, he would not have sought to be released, and clearly could not have been displaced by the company. He says he is released by the fraud of the directors; but that assumes that the fraud of the directors is the fraud of the company, which is really the whole question; he may perhaps have a right of action against the directors; but, assuming they had committed a fraud upon him, why should that discharge him from his contract with his co-shareholders, who were as much misled by the directors as he was. But further, it is not proved that the directors did commit

(a) 3 De G. & Sm. 85.

(b) 21 Law J. 468.

(c) 22 Beav. 35.

(d) 5 Irish Ch. and Com.  
Law Rep. 174.

any fraud upon him, still less that the body of shareholders were any parties to it, if there was a fraud. There is nothing to show that *Brockwell* made his contract upon the faith of the reports, nor is there any adoption by the shareholders of the fraudulent representations. That they got into the public papers does not make them the statements of the shareholders; the publication of such reports is common practice; it is not intended for the *public*, but simply to avoid the necessity of sending a separate report to each individual shareholder in a very numerous company. The public may see them, but they are not addressed to or intended for the public.

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[They cited also *Cornfoot v. Fowke* (a), *Henderson v. Royal British Bank* (b), and *Holt's Case* (c).]

The *Attorney-General*, Mr. *Selwyn* and Mr. *Giffard*, for Mr. *Brockwell*.

The company was desirous of increasing its capital, and of inducing the public to take shares under their supplemental charter. They left the directors to manage the transaction, and they thereby constituted them their agents. Even if directors were not agents of the company, so as to bind them generally, in this case they were in the nature of special agents, because the company entrusted to them the duty of inducing the public to take shares, and the course the directors took was to induce the public by false representations. My client saw those representations and took shares. He says he took them on the faith of those representations, and it would be absurd to suppose that they did not influence him. The company's agents commit a fraud,

(a) 6 Mees. & Wels. 358.

(c) 22 Beav. 48.

(b) 26 Law Jour. Q. B. 112.



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and the argument on the other side is, that the company may repudiate the fraud, and yet enjoy its fruits. *Cornfoot v. Fowke* (a) has been cited on the other side, but that case has been much misunderstood. There was no fraud there; the agent made a false statement, but he did not know its untruth; but how does that apply to this case? I send an agent to negotiate a particular arrangement; I give him, it is true, no authority to state what is false, but he does make a false statement, knowing it to be false, and that false statement allures the purchaser. How can it be said that that contract can enure for the benefit of the principal? The case of *The National Exchange Company v. Drew* (b) is exactly in point. It was the duty of the directors to make reports; in making reports they were acting strictly as agents of the company; and when those reports go forth to the public, they must be taken in law, as well as in common sense, to be the representations of the company. They referred also to *Easthope's Case* (c), *Tipperary Case* (d), *De Castro's Case* (e), *Sutton's Case* (f), *Meux's Case* (g).

But further, the contract is void on another ground; at the time this alleged contract was entered into, the company was in fact no banking company at all; they had obtained their supplemental charter by a fraud on the Crown. The 7 & 8 Vict. requires that the deed should be executed by all the shareholders, and that half the amount of each share should be paid up; neither of these things was done, consequently the charter was

(a) 6 Mees. &amp; Wels. 358.

(d) 1 Irish Jur. (N.S.) 373.

(b) M'Queen, Scotch Appeal, 103.

(e) 2 Jurist (N. S.) 1203.

(f) 3 De G. &amp; Sm. 262.

(c) 27 Law T. 195.

(g) 2 De G., M. &amp; G. 506.

void or voidable ; the company was carrying on business unlawfully, and could not contract to give shares.

Sir *F. Kelly* replied.

The VICE-CHANCELLOR (after stating the facts stated in pp. 205 and 206) :

So far, undoubtedly, Mr. *Brockwell* was liable, but he contends that he is not, by reason of his having been induced to take shares by false representations made by the company, and the question is, whether he can avail himself of that defence.

Mr. *Brockwell* was, it appears, a customer of the bank from 1853. In February, 1855, the company obtained its second charter, enabling it to extend its shares. It had power under that charter to issue a large amount of new shares. Mr. *Brockwell* says, and there is no doubt about it, that his inducement to take shares was the reports of the directors of the company, and in particular the report made in February, 1855, of the condition of the bank up to the 31st of the preceding December, and he says, that, in reliance on those reports, he took the shares. Now with regard to the law generally, how far a person who takes shares on the faith of representations, which are false, how would the matter stand if it were between individuals? If one person by fraudulent representations induces another to enter into a contract with him, the party making the false representations has, beyond all doubt, no right to enforce the contract. The party deceived may treat the contract as not binding. So that suppose an individual, carrying on a trade which is a losing concern, in which he has lost all his capital and is in debt, induces another to enter into partnership with

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him, by representing the business to be flourishing, and his capital to be entire, it is clear that he cannot insist on maintaining the partnership, or compel the person deceived to contribute to his losses. And so it would be if the false representations were made, not by the individual, but by his agent, even though that agent should not be expressly authorized to make the false representations.

If such is the rule in the case of individuals, can it make any difference that the party making the representations is not a single individual but a corporation?

Now, applying the rule to the facts of this case, how does the matter stand? The evidence shows, beyond all doubt, that the annual reports of this bank contained statements which were entirely false, and in that sense fraudulent; and it appears to me that that applies most distinctly to the report for the period ending the 31st of December, 1854. In fact, from the whole evidence, there is no doubt that the reports do contain false representations as to the condition of the bank, and it is not too much to say that this company was brought into existence by fraud, and continued by fraud, and that scarcely a single document emanated from the company which was not a fraud.—[His Honor then examined and commented on the evidence showing this broad result, observing, that if it were not so clearly proved that the things stated to have been done actually were done, it would have been inconceivable that any man, or any set of men, should have been guilty of such frauds. His Honor noticed also, that when the company applied for a new charter, they actually sent these fraudulent representations to the Board of Trade. He then continued :]—

Such was the condition of the bank on the 31st of December, 1854, and the directors at the meeting of February made the report referred to.

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Now the question is, is that report, a report prepared by the directors, and submitted to the shareholders on the 2nd of February, a report of the company, or merely a report to the company?

It appears that that report, with the acquiescence of the body of directors, was published in the newspapers. Then, what is the law of the case? This, I think, is a clear rule to be drawn from the authorities. If a company make representations that are false, persons acting under them would not be bound. But if the representations are not by the company, but by individuals, not agents of the company, but strangers, a party misled by the representations to become a partner would nevertheless be bound to continue a partner.

Now I think the question in this case is settled by the House of Lords in the case of *The National Exchange Company*. That case shows that a report made by the body of directors to the company, if it gets into circulation, must be considered as a report of the company.—[His Honor then referred to the judgment of the Lord Chancellor, p. 125, and to that of Lord *St. Leonards*, p. 139.]

The authority of these learned Lords would be sufficient to guide me, if I had any doubt; but I must say, that if it were requisite for me to lay down a rule, exclusive of authority, I should have no hesitation in arriving at the same conclusion.

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It has been argued that the form of heading of the report made it a private communication. But to allow the directors to resort to such a contrivance, in order to escape from the consequences of a report made substantially for the information of the public at large, would be contrary to common sense.—[His Honor then adverted to other arguments that had been used, in particular to the following: that it had been said that other persons might have taken shares on the faith of *Mr. Brockwell* having taken shares. On that the Court observed, that it was not shown that any person had in fact done so; but if they did, that could not lead the Court to decide that *Brockwell* must continue a shareholder in a company in which he had been induced to take shares by fraud.

[Then it was argued, that some of the original shareholders had taken shares on the faith of the fraudulent representations; to that the Court answered, that if that was so, it might be a ground for entitling those shareholders to be discharged from their liability, but could not have the effect of continuing *Brockwell's* liability. His Honor also observed that, in *Dodgson's Case (a)*, which had been cited, it did not appear what were the representations made, nor how they were made. And that in the other cases relied upon by the Official Manager, the reports were not reports of the directors, but of other persons, not agents of the company.

[The decision was, therefore, that *Brockwell* was not to be put on the list of contributories, and as he ought not to have been brought before the Court at all, he must have his costs out of the estate.]

(a) 3 De G. & Sm. 85.

1858:  
January 27.

*Lapse.*  
*Gift to Class.*

CRUSE *v.* HOWELL.

THIS cause came on for further consideration, and a question arose on the will of *Philip Howell*, the testator in this cause, who had six children at the time he made his will. By his will he gave various bequests to his children by name; and then he gave 10,000*l.* stock to two of his sons, in trust for his daughter *Mary Howell* for life, with reversion to her children, and in default of children, then after the decease of *Mary Howell*, in trust for and for the equal benefit of all such of his other children as should be living at the time of the decease of his said daughter *Mary Howell*, and the issue of any of such of his children, if any, as should die in her lifetime, leaving issue at her decease, and to become vested interests in such issue at the times and in the events therein mentioned.

Testator gave after the death of *A.*, one of his children, to such of his other children as should be living at the death of *A.* Held, this was a gift to a class; and that one of the children having died before the testator, the survivors took the whole.

One of the testator's children, *Ann Cruse*, died in 1851, living the testator, leaving the Plaintiffs her children. *Mary Howell* died in 1852, living the testator, without ever having been married, leaving her surviving three brothers and one sister, *Catherine*, and the children of the previously deceased sister. *Catherine* died after *Mary Howell*, but before the testator.

Of the five children therefore to share, all, or their issue, survived *Mary Howell*; but one, *Catherine*, died before the testator.

The question was, whether the share of *Catherine* lapsed, by her dying in the lifetime of the testator.

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 CRUSE  
 v.  
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The Plaintiffs, as the issue of *Ann Cruse*, were interested in having it decided that *Catherine's* share went to the survivors.

Mr. *Fooks* for the Plaintiff.

Mr. *Cole*, Mr. *Glasse*, and Mr. *Speed*, for other parties in the same interest.

This is a gift to a class,—to the testator's children : the class must be ascertained by reference to the period of the testator's death ; and those of the class who were living at the mother's death only can take. If a child had been born after the death of *Mary*, that child could not have taken ; the persons to take must meet the double qualification of being children of the testator at his death, and living at *Mary's* death. The whole, therefore, in the events, goes to the survivors. [They cited *Lee v. Pain* (a), and *Leigh v. Leigh* (b).]

Mr. *Baily* and Mr. *T. Stevens* for nephews and nieces interested in the residue.

The testator contemplated those of his children who should be living at the death of *Mary*. Then the class was ascertained, and the gift was then not to a class properly, but to ascertained individuals ; and the share of the deceased child has lapsed. It is not necessary, in order to make a gift to *personæ designatæ*, that it should be *nominatim* ; if the class is *fixed*, that is, if the persons who compose it are fixed, it is the same as a gift *nominatim*. *Lee v. Pain* is inconsistent with former decisions, and *Ham's Trust* (c) governs this case. Here, if you give the whole to the survivors, you

(a) 4 Hare, 225.

(c) 2 Sim. N. S. 106.

(b) 17 Beav. 605.

do not effectuate the testator's intent, which was clearly to devise his property in fifths.

The VICE-CHANCELLOR :

It is a plain rule, as a general rule, that if there is a bequest to certain persons *nominatim*, or so described as to be fixed at the time of the gift, so that there can be no fluctuation, then, if one of them dies in the life-time of the testator, his share lapses. On the other hand, it is equally the rule, as a general rule, that if the gift is to a class of persons, that is, persons not named and who cannot be ascertained at the time, constituting, therefore, a class liable to fluctuation, then those only who survive the testator can take.

The question is, is the gift in this will a gift to a class, or not ?—[His Honor stated the language of the gift (a).]

Is that a gift to a class, or to certain fixed individuals ?

The first question is, whether, though the word "my said" is not used, the language does not mean the children before described. It appears to me that if the testator had had another child (though probably he did not contemplate any other children), that that child would have been equally entitled with the others. If so, it is clear that it is a gift to a class; a class the qualification of the members of which is to depend on an event which might, and which in this case did, happen in the life of the testator; and the question is, whether that makes any difference in the application of the rule.

(a) *Ante*, p. 215.

1858.

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*Mary Howell* died, leaving her surviving five children of the testator, and one of them died in the lifetime of the testator. Does the fact that the qualification of the class depended on an event which happened in the lifetime of the testator prevent the application of the rule? Sir *James Wigram* was of opinion, in *Lee v. Pain*, that it does not; that case of *Lee v. Pain* is really on all fours with this. Then there is the case of *Leigh v. Leigh*, which goes even further. It is not necessary for me to give any opinion whether it is right in the extent to which it goes; it is sufficient that it at any rate is a complete approbation of *Lee v. Pain*. Then there is the case of *Ham's Trust*, which was decided otherwise. But I do not think that case conflicts with the general rule. Whether the reasoning on which it proceeds is sound or not, it is not necessary for me to consider; for I think the Vice-Chancellor affirmed the general principle.—[His Honor adverted to the judgment, and continued:—]The ground on which that case was decided does not apply to this case: it proceeded on this, that you could not in that case give the property in the same manner as the testator obviously intended, if you gave all to the survivors.

The Court decided that the surviving children or issue of children took the whole.

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1857:  
January 24, 27.

*Tenant for Life.  
Remainderman.  
Administration.*

SHORE v. SHORE.

**THIS** case came on upon an adjourned summons.

The testator *Samuel Shore*, by his will dated the 6th August, 1836, bequeathed his personal estate, subject to the payment of his debts and funeral and testamentary expenses, to his son *Offley Shore* absolutely. He gave also five legacies of 10,000*l.* each to his five daughters, which he charged upon his real estate, bearing interest at 4 per cent., expressly exonerating his personal estate from them. One of the daughters died in his lifetime, so that her legacy lapsed; so that 40,000*l.* was charged on the real estate.

He devised all his real estate (with a specific exception) to trustees, as soon as conveniently might be after his death, to raise by sale or mortgage thereof, or of a competent part thereof, sufficient to pay *the legacies and any interest due thereon, and also any debts which his personal estate might be insufficient to pay*, and any surplus he gave on the same trusts as of his estates unsold; and the first trust of the residuary real estate was to his son *Offley Shore* for life, with remainder to the children or issue of the body of *Offley Shore* as he should appoint, and in default to the first son of his body who should attain twenty-one, and in default of any sons to daughters, &c.

In the administration of a mixed estate, real and personal, where, owing to peculiar circumstances, considerable time has elapsed before the personal estate can be realized, and in the meantime interest runs upon debts and has been paid out of the income of the tenant for life of the real estate, the Court will investigate the application of the personal estate, so as to determine the equities between the tenant for life and the remainderman.

At the time of his death he was very largely indebted,

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partly on mortgage, partly on other debts, which were in part specialty and in part simple contract debts.

*Offley Shore*, the son, was a member of the firm of *Parker, Shore & Co.*, bankers; and the testator, partly by borrowing on mortgage, partly on other accounts, had lent largely to the firm.

*Offley Shore* the son, being both executor and residuary legatee, and tenant for life of the real estate, received the rents of the real estate, kept down the interest due on the mortgages, and all the other debts of the testator, from the time of the testator's death down to the period of the bankruptcy of himself and his firm in January, 1843; and the payment of the interest absorbed wholly, or very nearly, the income of the real estate.

Shortly after the bankruptcy of *Offley Shore*, viz., in April, 1843, this suit was instituted by *Harrington Offley Shore*, the remainderman, to have the trusts of the will carried into execution; and shortly after the institution of the suit a receiver was appointed; so that almost immediately from the time of the bankruptcy the Court had possession of the real and personal estate through its officer.

Under the bankruptcy nothing was received by the receiver till February, 1847, and the personal estate was outstanding nearly eleven years from the testator's death, but subsequently all or nearly all the personal estate of the testator was got in; but no part was applied in payment of debts except a sum of about 29,000*l.* in payment of mortgage debts. On the 5th of March, 1847, a decree was made for sale of the real estate; but

the sale did not take place immediately, as it was admitted, on account of the state of the money market making it prejudicial for all parties to hurry the sale. The sale did take place in 1850 and 1851, and the question was now, what were the equities between the tenant for life and the remainderman as to the administration of the personal estate.

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*Mr. Baily* and *Mr. Bagshawe, jun.*, for the Plaintiff.

The testator has by his will directed that his real estate be sold to satisfy so much of his debts as his personal estate will not pay. He has, therefore, impliedly directed that his personal estate shall wholly go in payment of his debts before the real estate is resorted to. The personal estate ought, therefore, now to go to pay the principal of the debts; and when that is done, and not before, the real estate may be resorted to. If it is said that the personal estate has been outstanding a long time, and that during that time the tenant for life of the real estate has paid the interest, the answer to that is, that the outstanding of the personal estate has arisen from litigation and other causes, which were for the benefit of all parties; at least, for the benefit of the tenant for life as much as of the remainderman. If the personal estate had been at once collected, it is clear it must have gone in payment of principal, because there would have been then no interest on debts to pay, and then, to the extent to which it did not satisfy the principal, the real estate must have been sold, to the detriment as much of the tenant for life, by diminishing his income, as to the detriment of the *corpus* of the remainderman. The cause of the difficulty is, that interest on the personal estate has been lost,—that is not to be charged on the remainderman; it is an accident by

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which there is simply so much less personal estate to pay debts; and it does not alter the rule, that the income of the tenant for life must go to keep down interest, and the *corpus* must pay the principal. It is asked now to go into questions between the tenant for life and remainderman. That is not the course of the Court; the course is, that the tenant for life keeps down the interest; and when the personal estate is administered, the Court does not go back upon the previous transactions, but pays the debts and interest, if there be any, out of the personal estate, and then charges the real estate, in the usual course, income with interest, and *corpus* with principal. Here there is no interest to pay; the interest has been, as it ought to be, kept down out of the income of the tenant for life, and the personal estate ought now to pay the debts.

Mr. *Barber*, for Defendants, in the same interest as the Plaintiff.

Mr. *Glasse* and Mr. *Osborne* for the assignees of *Offley Shore*, the tenant for life.

The suit was instituted in 1843. The postponement of the sales of the real estate was not for the benefit of the tenant for life, but of the remainderman.

We say the disposition of the personal estate ought to be what it would have been if it had been collected gradually in reasonable time. If that had been so, what would have been done, and what would have been the effect? Why, the interest of the personal estate would have been applied in keeping down the interest of the debts, and the *corpus* of the personal estate, whenever there was enough, would have been applied in payment of principal; the effect would have been to relieve the

income of the tenant for life of the real estate *pro tanto*, by payment of interest, and to divide the burden equally as between the tenant for life and the remainderman. But what has taken place? The personal estate has not been applied at all; as it came in it has been kept in Court, except a portion applied to pay off principal debts; the rents of the real estate have gone during the whole time since the testator's death to keep down interest. The payment of the personal estate now to pay principal will have this effect; that the tenant for life will have been paying during fourteen years much more interest than he would have had to pay if the delay had not occurred; and the whole benefit of those payments and that delay will go to the remainderman, by relieving his estate from payment of principal. The equitable course is, that the personal estate ought now first to recoup the tenant for life for interest which he ought never to have had to pay, and that then the remainder should go in payment of principal. And then if there remain any debts to be discharged out of real estate, the tenant for life and the remainderman will each bear their equitable proportions; the one in the diminution of rents, the other in the diminution of *corpus*. The Court will now go into such questions; it is true that it does not in general do so, but that is because in general no great delay takes place, and no such questions to any material extent arise. But when, by reason of delay in getting in the personal estate, injustice would arise by following the usual rule, by throwing an inequitable burden on the tenant for life, the Court will go into the question of separating principal from interest in administering the personal estate.

Mr. *Baily* replied.

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Judgment.

The VICE-CHANCELLOR, after stating the facts, proceeded thus :—

The question is, what is the equity between the remainderman and the tenant for life in respect of the administration of the personal estate. The question is of considerable importance; and at first sight it appears remarkable that there is so little authority upon it; no actual decision was cited in the arguments. Now, I have no hesitation in saying that as a general rule, subject of course to such exceptions as may arise in particular cases, where personal property producing income is liable to charges bearing interest, and subject to that is bequeathed to one for life, with remainder over, the common equity is, that the income is charged with the interest, and the principal with the *corpus*. That is the ordinary rule; and in the ordinary case of personal estate subject to debts, the course is, in administering the estate, to apply the *corpus* in paying the principal, and the income to payment of the interest.

But this is not that simple case. Here the question is not merely whether the tenant for life should bear the interest and the remainderman the principal, but whether there is an equity between them to go back and look into the administration of the personal estate.

While the case was being argued, I suggested that I was endeavouring to recollect, and could not call to my recollection, the form of any decree for such a purpose; and, no doubt, such a state of circumstances not being usual, and considering that in ordinary cases no great lapse of time elapses between the death of the testator and the administration of his estate, the Court is not particular in inquiring into the application of the

personal estate, and it is not extraordinary that there should be no settled form of decree applicable to these circumstances; but cases occur under particular circumstances, in which a considerable time elapses, owing to the position of the testator's assets, before the personal estate is realized, so that there is a considerable period during which interest runs upon the debts, and income is derived from the real or personal estate; and in such cases it appears to me that this Court will enter into the question, and administer an equity between the tenant for life and remainderman. Now there is a case in *Ireland*, before *Lord St. Leonards*, *Coote v. Lord Milltown* (a), which I think is very instructive on the question before me.—[His Honor then stated the facts of the case, and referred to the judgment.]—Now, no doubt what *Lord St. Leonards* meant was this, that where the question arises between tenant for life and remainderman, as to what is the extent to which the real estate will be relieved, the Court will investigate the application of the personal estate; and the decree in the case before *Lord St. Leonards* contains very much the sort of direction that I think I ought to make in this case.—[His Honor then referred to the terms of the decree in *Coote v. Lord Milltown*.]

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In the peculiar circumstances of this case, judging from the statements of both sides, the parties will be relieved from much investigation, viz., up to the time of the bankruptcy, to which time it appears Mr. *Offley Shore* regularly kept down the interest. All the discussion raised relates to what took place after that; I shall therefore give directions to the Chief Clerk to proceed with inquiries from that period, according to the terms of *Lord St. Leonards'* decree.

(a) 1 Jones &amp; Lat. 501.



1858:  
Jan. 30  
and  
Feb. 1.

*Tenant for life.  
Remainderman.*

ALLEN v. EMBLETON.

Testator had leaseholds; one he assigned to his partner, who, after testator's death, took another partner, *A.*, and became bankrupt. The bankrupt repudiated the leaseholds, and *A.*, under the direction of the Court, paid 100*l.* to the executors to release him from liability, and re-assigned the lease to the executors. The testator had bequeathed his residue for life, with remainder over. Held, that as to rent due at the death of the testator, and subsequent rent and dilapidations, the *corpus*, and not the tenant for life, must bear them.

**T**HIS was a summons before the Judge adjourned into Court. The question was with reference to certain leasehold property of the testator in the cause.

The testator had been in partnership, and was possessed of a certain leasehold which he had taken for the purposes of his trade. Before his death he assigned the leasehold to his partner *Marter*, who, after his death, took another partner, *Jones*, and then became bankrupt. The estate of the testator, therefore, remained liable to the covenants, but the assignees of the bankrupt, and *Jones* were liable over to the executor.

The assignees of the bankrupt repudiated the lease, and *Jones* then offered to compromise his liability to recoup the executors of the testator as against any demands of the landlord, by paying to the executors 100*l.*, the executors taking an assignment of the lease. This compromise was approved by the Court, and carried into effect.

At the date of the testator's death rent was due, and after his death further rent accrued due, and there were also liabilities for dilapidations.

The testator by his will had bequeathed his residuary estate, comprising other leaseholds, to one for life, with remainders over, in such terms that in the ordinary course of administration his leaseholds would have been sold, and the proceeds invested in the usual

way for the benefit of all parties. But the parties had throughout treated the leaseholds as to be enjoyed specifically by the tenant for life, and he was in receipt of the rents. It was admitted that the particular leasehold in question was unlet, and that there was no probability of its being let so as to be a beneficial lease; and the question was, whether the tenant for life was liable to pay the rent and dilapidations, or whether it must be borne by the general residuary *corpus*.

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Mr. Glasse and Mr. Bristowe, for the tenant for life.

The rent and dilapidations are simply a debt of the testator's estate; how can it be asked that that should be borne by the tenant for life? The executor would have been bound to pay it, and must have been indemnified out of the *corpus*. That is the whole of our demand. We are simply asking that the estate may indemnify the executor against a debt of the testator. This leasehold never was part of the testator's estate at his death, and did not pass by his will; his estate was, of course, liable for the rent and other demands of the landlord, and that is a debt. The executor has, it is true, got back the leasehold, but how? Why, by compromise with Jones. Jones, as assignee, would have been liable to the executor, and the executor receives, for exonerating him from that liability, 100*l.*, and takes back the lease. He makes it, no doubt, part of the testator's estate; not a part of his estate passing by the will, but part of his general personal estate. The tenant for life derives no benefit from it, and is not bound to adopt a *damnosa hereditas*.

They cited *Garrutt v. Lancefield* (a), *Pickering v. Pickering* (b).

(a) 2 Inst. (N. S.) 177. (b) 2 Beav. 31.

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Mr. *Swanston* and Mr. *Beavan*, for the parties in remainder.

This lease was the testator's; it has come back to his estate, and forms part of the residue which he has bequeathed to the tenant for life with remainders over, and the parties have acted upon the will as if it gave the leaseholds, although perishable, to the tenant for life in specie; he has so enjoyed them. Can he say, I will accept certain leaseholds, which are beneficial, and I will repudiate another which is not? He must take under the will altogether, or not at all: *Tracy v. Hereford* (a). This is a charge from year to year, and the tenant for life always bears such charges. The tenant for life is entitled to the clear annual income. What is that? Why, the difference between the annual payments and the annual receipts. It is quite immaterial that the lease has been reassigned to the executor; that does not alter the case. If it had not been re-assigned, the liability of the estate *de anno in annum* remained, and that must be paid by the tenant for life, who cannot draw income from the estate till he has paid its annual outgoings. If the lease has become virtually part of the estate by the re-assignment, then how can it be questioned that the tenant for life cannot repudiate this prejudicial lease, while he enjoys the income of the beneficial leases.

*Garratt v. Lancefield* does not apply, the question was not there between tenant for life and remainderman.

#### THE VICE-CHANCELLOR:

Judgment.

By the will, the residue is bequeathed in such a way as to make a certain person tenant for life with remainders

(a) 2 Bro. C. C. 128.

over; and it has been construed as if it were a bequest entitling the tenant for life to enjoy the property in specie.

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Now, if the leasehold in question had remained the property of the testator; if it had not been assigned to *Marter*, then this leasehold would have formed part of the testator's residuary personal estate, and the tenant for life would have been tenant for life of this and the other leaseholds; and then the tenant for life would have had no right to say, I will take leasehold *A.* because it is beneficial, and I will repudiate leasehold *B.* because it is not beneficial; and, if I were deciding anything trenching on that principle, I should be wrong. But I am not interfering with that principle. It appears to me, that this is not at all that case. Here the testator was not the owner at the time of his death. He had parted with the property; and the tenant for life under the will is not tenant for life of this leasehold. If there had been no re-assignment to the executor, and if then the lessor had come upon the executor of the testator for rent, or for dilapidations, what would have been the consequence? Why the residuary *corpus* of the estate must have borne it; it was a liability of the testator at his death, subsequently ripened into payment.

Now, in that state of things, *Jones* offered a compromise of 100*l.*; and by the authority of the Court the executor was authorized to compromise; to accept 100*l.*, and to take all the responsibility in exoneration of *Jones*. What is the effect of that? As to *Jones*, the testator's estate being liable to the payment, compromises its right of recovery over against him.

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Then here is a leasehold assigned to the executor for the benefit of the testator's estate. With what view? Because it was considered for the benefit of the testator's estate. If the tenant for life had been told that he would have to bear the *onus*, he would have refused to acquiesce in the compromise; and the object of the arrangement was, that as the *corpus* would suffer damage by the liability, it should be recouped by getting back the property.

The effect was not to bring it back as part of the testator's estate under his will; but simply to make it part of his estate by the act of the executor, in order to recoup the estate.

It appears to me, therefore, that these liabilities must be borne by the *corpus*.

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Feb. 1.

Will.

Construction.

Words.

## BLAGROVE v. BRADSHAW.

Limitation by will to certain persons, with a direction that they should within twelve months *next* after becoming entitled in possession take testator's name and arms, and that if they should decline, neglect or discontinue such name and arms for twelve months *after* becoming entitled, their estates should go over. Held, that a donee who took the name and arms, and used them for some years after becoming entitled in possession, and then discontinued them for twelve months, had committed the forfeiture, and the remainders over took effect.

**T**HIS was a special case, in which the Plaintiff was the remainderman under the limitations of the will of *John Blagrove*, and and the Defendant *H. Bradshaw* was the tenant for life.

*John Blagrove*, by his will dated February, 1822, gave certain property in the *West Indies* to trustees, in trust for his daughter *Eliza Bradshaw* for life, remainder to his grandson *Henry Bradshaw* for life, directing

that he should be let into possession at the age of twenty-five, and not sooner, with remainder over to the sons of *H. Bradshaw* in tail male, with remainder, as to a moiety, to his grandson *H. Coore* (son of his daughter *Isabella*) for life, remainder to his sons in tail; and as to another moiety, like remainders to another grandson, and his sons in tail, and then in the latter part of the will there was this proviso:—Provided always, and it is my will, I desire and I do hereby direct that all and every the sons of my said respective daughters, *Eliza Bradshaw*, *Isabella Coore* and *Charlotte Parker*, and the issue male of such sons, as and when and within the space of twelve calendar months next after they shall severally become entitled in possession to any of my said plantations, estates, messuages, lands, tenements and hereditaments under and by virtue of this my will, if they shall severally be of the age of twenty-one years when they shall so respectively become entitled as aforesaid (but if they shall be then under that age, then within twelve calendar months after they shall attain that age), shall assume and take upon themselves respectively the surname of *Blagrove*, (they respectively not being of that name,) and by such name only and no other, thenceforth shall style and subscribe themselves respectively in all deeds, instruments and writings, and on all other occasions, and also shall and do bear the arms of my family alone, and do and shall apply for and endeavour to obtain an Act of Parliament or proper licence from the Crown to take such other means as may be requisite and proper to enable and authorize respectively to take, use and bear the surname and arms of *Blagrove*; and in case any of the persons aforesaid shall refuse, decline, neglect or discontinue to take and assume and use such surname and arms respectively, or shall refuse or neg-

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lect to endeavour to obtain such Act of Parliament or licence as aforesaid for that purpose, for the space of twelve calendar months after they shall severally so become entitled as aforesaid, or shall respectively attain the age of twenty-one years, as aforesaid, then and so often as the case shall happen, the estate and interest of every such person so offending in the premises of or in the said plantations, estates, messuages, lands, tenements and hereditaments, shall from and immediately after the expiration of the said space of twelve calendar months, cease, determine and be void, to all intents and purposes whatsoever, and every the said plantations and estates, messuages, lands, tenements and hereditaments, so devised as aforesaid, shall immediately thereupon go to the person or persons who shall then be next in remainder under or by virtue of the devises and limitations hereinbefore contained, in the same manner as if he or they so offending in the premises, being tenant or tenants for life, were then actually dead, or being tenant or tenants in tail by purchase was or were dead without issue inheritable under the limitations aforesaid, or being tenant or tenants in tail by descent was or were dead without issue inheritable as aforesaid, and there was a general failure of issue inheritable under the entail created by the limitation to the first taker and the heirs inheritable as aforesaid of his body.

The testator died in 1824. *Eliza Bradshaw* died in 1829. *Henry Bradshaw* attained the age of twenty-five years in 1844, and was then let into possession, but he had previously, that is on the 11th December, 1840, taken the name and arms of *Blagrove*. In November, 1856, he resumed the name and arms of *Bradshaw*, and continued to use them down to the time of

filing the special case, more than a twelvemonth. He had no male issue. The Plaintiff was an infant, the only son of the testator's grandson, *H. Coore*.

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The principal question for the decision of the Court was whether, in the events above stated, the estate limited to *H. Bradshaw* for life, with remainder to *H. Coore* and his sons in tail, had been forfeited by *H. Bradshaw*, and gone over to the Plaintiff.

*Mr. Glasse* and *Mr. Nalder* for the parties claiming under the limitation over.

*Mr. Bradshaw* was bound to take the name and arms within twelve months after coming into possession. He did so before he came into possession; that is quite immaterial. But he was also not to discontinue it, if he did, the estate was to go over. It will be said that it was not to go over unless he discontinued it for twelve months next after coming into possession. But that cannot be the intention, since he had twelve months to elect whether he would take it. The twelve months mentioned must therefore refer to a different period with regard to discontinuance, from that to which they refer with regard to refusal. In the one case the words can only refer to twelve months next after; but in the other, the discontinuance, it is doing no violence to the language to construe it as meaning, and the very sense of the whole limitation requires it to be construed as meaning, discontinuance for any twelve months after obtaining possession. Well, then, *Mr. Bradshaw* has done that very thing; he has discontinued for and during more than twelve months after he has obtained possession, that is to say, from November, 1856, for more than twelve months, and the forfeiture has taken place.



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Mr. *Baily* and Mr. *C. C. Berkeley* for Mr. *Bradshaw*.

It is well settled that to divest an estate *clearly given*, you must have it as *clearly divested*. That is not so here. The limitation over directs that the estate shall go over from the period *aforesaid*. What is that period? No period is named, except twelve months after taking possession. The testator could not have meant that the estate should vest in a twelvemonth after taking possession, and be enjoyed for a long period, and then go over from a long antecedent period. What then did he mean? It is said on the other side that he meant as to discontinuance, any twelve months after taking possession. But it is clear that as to refusing, he meant twelve months *next* after. It is true that the word *after* may, irrespective of the context, mean any time after, or next after. But which does the testator mean? It is, putting it on the lowest ground, exceedingly obscure, and then the rule applies that you cannot divest a clearly given estate by a limitation over which is ambiguous. But, further, we say, the word *clearly* is used in the sense of *next after*, and then the limitation over is impossible; for Mr. *Bradshaw* could not discontinue till he had used the name, and he had twelve months to elect to use it, and not till after he had used and discontinued the name, could the estate go over. But then, as he must to forfeit have discontinued also within twelve months next after taking possession, there was no possible increment of time, during which discontinuance incurring forfeiture could have existed.

II. The directory clause does not apply to Mr. *Bradshaw* at all. The direction is, that those persons not having the name of *Bradshaw* shall take it. But he had already taken it, and therefore he was not one of

the persons directed to take it. If the directory clause does not apply, then the forfeiture clause does not; for it is applied only to the persons *aforsaid*, and *Bradshaw*, in this view, is not one of the persons *aforsaid*. There are no words in the limitation over, referring to persons discontinuing who already had the name; and it is clear that the testator was throughout only contemplating the taking and discontinuance, by persons who had not at the time of coming into possession the name of *Bradshaw*.

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Mr. *Haines* for the trustees.

Mr. *Glasse* was not called on for a reply.

The VICE-CHANCELLOR :

Judgment.

I think this case is clear. No doubt if there is a clear and specific devise of an estate, and then a clause divesting that estate, the divesting clause must be construed with great strictness. But it does not appear to me that in this case there is any fair doubt. The estate is given in effect to the sons of *Eliza Bradshaw* for life, with limitations over, divesting their life estates in certain events. The question is, whether the life estate of *Henry Bradshaw* is divested by the clause of limitation over.

The first question is, whether Mr. *Bradshaw* comes within the description of the persons to whom the name and arms clause applies. Now, in describing those persons, the testator has described them as the sons of his daughter *Eliza Bradshaw*, and casting out of view the parenthesis, it would have been useless to give that direction, to take the name and arms, to those who had them already. Then comes the parenthesis

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(see p. 231): the *intention* of that is only to point out that those who have not the name are to take it; not to exclude from the general direction, which is, that those who have it already are to take and keep it; and then when you come to the limitations over, the direction is in case any of the persons aforesaid, that is the sons of *Eliza Bradshaw*, and putting a fair interpretation on the whole, I think the persons to whom the divesting clause applies, are all the sons of *Eliza Bradshaw*.

Then the question is whether, as to the language of the gift over, there is a gift over in the event of discontinuing to use the name, unless it took place within twelve months next after the party became possessed. And I think the language is sufficiently clear. Suppose the testator had not used the word *next* at all. When he is giving a direction for taking the name and arms within twelve months, the word after must mean next after; it can mean nothing else. But when he says "if you discontinue it for the space of twelve calendar months after," then these twelve months may mean any twelve months after: and he has applied the word indifferently to refusing and to discontinuing. Why is the word *after* to be limited to *next after*, when the sense does not require it? Why should not the words apply to any twelve months? But further, in the first part of the clause, he does use the words next after; and when he speaks of coming of age, he does not use the word next; and then, when he comes to the clause of limitations over, he uses only the word after. I think he meant, the twelve calendar months to apply to the period necessary, according as it was a refusal or a discontinuance; a discontinuance of course implies that the party has done the act; and any other construction than that which I am adopting would make the clause of limitation over

not commensurate with the directory clause. If the gift over is only to take effect within twelve months immediately after acquiring possession, it would not be commensurate with the direction to continue permanently to use the name. Therefore I think the case falls within the legitimate construction of the words, and that the forfeiture has taken place.

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1858:  
Feb. 11.

*Vendor and  
Purchaser.  
Debtor and  
Creditor.*

VINEY v. CHAPLIN.

**THIS** was a motion in a suit for specific performance, to restrain an action brought by the vendor for the purchase-money. The purchase was of certain premises for a sum of little more than 900*l*. The conveyance had been prepared, and engrossed and approved, and there was no dispute about any point except to whom should the money be paid.

The day fixed by the contract for completion was the 7th January; a short time previously to that the deed had been procured to be executed by the vendor, by his solicitor Mr. *Steele*; the purchaser, Mr. *Viney*, wished and at first insisted that he should see it executed in the presence of a witness of his own choosing. But he afterwards waived that; but he required that he should pay the money into the proper hands of *Chaplin* the vendor; and, in the latter end of December, some correspondence passed between the solicitors, to show that Mr. *Chaplin* was unwell and did not wish to be disturbed, and wished Mr. *Steele* to receive the money, but the vendor gave no power of attorney or other written authority to his solicitor. The purchaser still therefore pressed for an appointment with Mr. *Chaplin*. On the 6th of January, Mr. *Chaplin* brought an action

In the absence of special circumstances, a purchaser has a right to insist on paying the purchase-money into the hands of the vendor; a verbal authority to the vendor's solicitor does not deprive the purchaser of this right: and, *semble*, that a power of attorney or other written authority would not.

A purchaser has also a right to have the deed executed in his presence, and attested by a witness of his own choosing.

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against Mr. *Viney* for the purchase-money and interest, and the costs, 2*l.* and a fraction. On the 7th, Mr. *Viney* called at Mr. *Chaplin's* house to tender the money and interest and costs, but Mr. *Chaplin* was out, and *Viney* left a written message to say that he had called to tender the money. On the next day he again called several times, but *Chaplin* refused to see him, and on the same day he wrote to him begging him to make an appointment to complete either at Mr. *Steele's* or at his own house. This letter was returned unopened, and then the purchaser filed this bill, and moved to restrain the action.

Mr. *Glasse* and Mr. *Druce*, for the motion.

The action was improper. It is the right of the purchaser to see the money paid into the hands of the vendor himself. He is not bound to pay it even under a power of attorney, or other written authority, still less under a mere verbal authority. How is he to prove the authority if the money had been lost? The witness may be dead or inaccessible. No doubt it is the general practice to pay purchase-money to the vendor's solicitor, but that is a matter of convenience, not of right. There is no authority on the point, but it wants no authority to establish so plain a proposition as that a debtor has a right himself to see the money into the hands of his creditor.

Mr. *Baily* and Mr. *G. L. Russell*, *contra*.

This is a pure legal question, and can be tried much better at law than here. The question is, did the purchaser refuse to pay the purchase-money or not? If refusing to pay Mr. *Steele*, the vendor's solicitor, was a refusal, then the verdict would be for us, and that is the whole question to be tried.

The practice is in our favour. It is universal to pay the money to the solicitor, and great inconvenience would ensue if a contrary rule is to be laid down. Besides, the solicitor is the vendor's agent, and here there was an express authority from the vendor. Payment to the Plaintiff's attorney in an action, by the Defendant, has been decided to be good payment. Why, because he is his attorney and agent, and so he is as between vendor and purchaser.


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The VICE-CHANCELLOR, without calling for a reply :

The more I have heard of this case the stronger has become my impression of the absurdity of the action that has been brought. I am not satisfied that the question can be tried at law. I need not say that if it were the case of a purely legal question, I should prefer leaving it to the proper tribunal; but it is a plain and clear principle that in matters relating to the specific performance of contracts this Court is the proper tribunal; and this being a clear case of specific performance, on which both parties are agreed that there ought to be specific performance, with no dispute about the title, or any other question than that before me; if there must be litigation, this Court is the proper tribunal for it.

Judgment.

The question is really as plain as possible. *Viney* has agreed to purchase of *Chaplin* a certain house and premises for a certain sum of money; and no dispute exists as to the contract, the abstract, or the conveyance. But the question was at first raised, though it has since been given up—what is the ordinary, or strictly proper course, in reference to the execution of the conveyance? Now the purchaser has a right to have a

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conveyance prepared ; he incurs the expense of preparing it and seeing it executed ; and his title depends on the validity of the conveyance. I think he has a right to say, "I will have the execution of the conveyance attested by my own witness." No doubt a very frequent, and, for convenience, not an improper practice, is to let the vendor's solicitor get the deed executed by his client, and the general high character of the profession renders such a course in general unobjectionable. But still, notwithstanding the deserved reputation of that branch of the profession for integrity, we know that there have been instances of gross breach of duty, instances of solicitors obtaining payment of the purchase-money by fraud, and leaving the innocent parties to pay it over again.—[His Honor here observed that he did not intend, by adverting to such instances, to cast any imputation on the general body of solicitors, of the honor and integrity of whom his Honor again took occasion to express his conviction, and then proceeded :] —But if such instances have occurred, and if a purchaser is to take a deed on which his title depends, *primâ facie* as a rule, he has a right to see the execution of the conveyance attested by a witness of his own, and to be present. For his own safety that is his right. That question has, however, been waived by Mr. *Viney*. But he says then, "Let me pay the purchase-money into Mr. *Chaplin's* own hands ;" and the question is, whether a purchaser has not a right to say, unless there are special circumstances against that right, "I prefer to pay the money to the person who is my creditor, and then to receive the conveyance?" Surely this is a simple natural right. No case is required to establish it ; but authorities would be requisite to show that it does not exist. If *A.* owes money to *B.*, he has a right to pay it to *B.*, and to no one else. Even where there

is a written authority, the purchaser runs a certain amount, trifling no doubt, but still some amount, of risk. But when he is asked by a mere verbal message, through, in this case apparently, a servant, to pay to another person, surely there is risk. It is not merely the risk that the person receiving the money may be dishonest, but whether he can prove the authority. Suppose the creditor dies, and his executors, who know nothing about it, except that the money has not been received, bring an action. What will the debtor have to do? Why, he must of course prove that there was an authority given by the deceased creditor.

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I do not say positively how it would be where there is a power of attorney; but even there, if the debtor does not pay to the attorney, who would bring the action? not the attorney, but the principal. Now, if a power of attorney not only authorizes but compels the debtor to pay to the attorney, it is the attorney who ought to have the right of action. If the attorney can say, "Not only you may, but you shall pay to me," why cannot he bring the action? But no one ever heard of such an action. But, at any rate, if there is not a power of attorney, as a strict rule, the debtor has a right to say, "I will pay to my creditor, and to no one else." I do not say he has a right to make the creditor come to him to be paid, but he has a right to go to him.

Supposing in this case that after the authority given to Mr. *Steele*, Mr. *Viney* had gone to Mr. *Chaplin*, and found him at home, and had actually tendered him the money; and then suppose *Chaplin* had said, "I will not receive it. I do not like (as it has been put at the bar) to be troubled with people coming to me to pay



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money; pay it to *Steele*;" can it be contended that if he had after that brought an action, and the tender was proved, he could recover? It is said, that there is no authority for the rule stated. But I do not want authority to establish it; it is a rule of plain common sense, of principle, and I should want authority to show me that it is not the rule.

Is there, then, in this case anything in the nature of special circumstances to take it out of the rule? The circumstances are these:—the draft conveyance was prepared by the purchaser and handed over to the vendor's solicitor; being returned approved it was engrossed by the purchaser, and the engrossment was handed to the vendor's solicitor, who gets it executed; that was a usual and not improper course, and I cast no censure upon Mr. *Steele* for it. But the purchaser said, "I should like to see it executed," and at first insisted on its being re-executed. However, he afterwards waived that; but then he said, "Let me pay the money to *Chaplin*. I insist that it shall be paid to him." Then what follows; on the 6th of January, the day before the day fixed for completion, Mr. *Steele* brings this action for the money. There was no refusal to pay; on the contrary, the debtor was willing to pay. But Mr. *Steele* says, "I insist you shall pay to me." Then on the 7th, the purchaser goes to *Chaplin's* house; waits there a long time, and leaves a written message, saying he came to tender the purchase-money and interest and even the costs of this foolish action, and what does *Chaplin* say? he sends a verbal message by somebody, one of his servants, to say, it is to be paid to Mr. *Steele*; and on the 8th the Plaintiff again calls three times at *Chaplin's*, in order again to tender the money; and *Chaplin*, who was then at home, refuses to see him; on

the same day the purchaser addresses a letter to *Chaplin* in which, in a tone almost supplicating, he entreats the vendor to assist him, and offers to meet *Mr. Chaplin's* convenience in any way to pay the money to him, and this letter *Chaplin* returns unopened! I must say there is a strong contrast between the conduct of *Mr. Viney*, and *Mr. Chaplin* and his solicitor. Both these gentlemen take on themselves authoritatively to lay down as law that which is not law, and I must say that as regards their conduct, at any rate that of *Mr. Chaplin*, it was simply grossly rude. However, I am not here to try whether their conduct was rude or courteous, but only to try whether *Mr. Chaplin* was entitled to bring this action. I have no hesitation in saying he had no such right. In the absence of special circumstances, and here there are none, a creditor has no right to require his debtor, merely by a verbal message, to pay to any person other than himself. The action was most foolish and most improper.

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*Mr. Glasse* again offered at the bar to pay into Court the purchase-money and interest to this day, and the costs offered on the 7th January.

1857 :  
July 28.



*Tenant for Life.  
Remainderman.*

COOKE v. CHOLMONDELEY.

Testator devised his estate upon trust during lives, out of the rents, to pay his debts, &c., to keep up the mansion house, to pay an annuity to his daughters, and subject thereto to pay the rents to his wife and daughters. There were mortgages which exhausted the rents. Held, that one of the daughters and the wife might have part of the estates sold to pay off the mortgages.


**T**HIS was the petition of the Rev. *Joseph John Geary Cholmondeley* and his wife, formerly *Lady Turner*, and of *Mrs. Fryer*, the testator's daughter, by her next friend, to have part of the estates of the testator in the cause sold to pay off mortgages. The suit was to administer the estate of *Sir Gregory Osborne Page Turner*.

*Sir Gregory Osborne Page Turner* by his will, dated the 15th June, 1841, devised his real estate to the Plaintiffs, upon trust, during the lives of the Petitioner, his wife (the Petitioner *Mrs. Cholmondeley*) and of *Mrs. Fryer* and of the survivors of them; and after the decease of the survivors to the use of the sons of his daughters in tail male, with remainders over. The trusts were out of the rents, to pay his debts (other than debts charged on the real estates by way of mortgage) and his legacies, &c.; then to keep up the mansion house and other buildings; then out of the surplus to pay to his daughters an annuity of 7,000*l.* a-year, and subject thereto to pay the rents to his wife during the joint lives of her and her daughters, and after the decease of either then to the survivor for life.

The testator's real estate was charged with mortgages to the extent of about 88,000*l.*

The Petitioners alleged that they had not for a long

time received the annuities and life interest respectively, by reason that after payment of the prior charges there was no surplus of rents. That there were outlying estates which, if sold, would pay off the mortgages, and leave a rental applicable to payment of the annuity and some of the life interest given to the testator's wife.

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The question was, whether a tenant for life and an annuitant could have any part of the estates sold against the will of the remainderman, confessedly to increase their own incomes.

*Mr. Baily* and *Mr. Jessell* for the Petitioners.

*Mr. Glasse* and *Mr. Freeling* for the Respondents.

*Mr. Cooper* for the trustees. *Lord Penrhyn v. Hughes (a), Caulfield v. McGuire (b), Sharshaw v. Gibbs (c)* were cited.

The VICE-CHANCELLOR :

The question in this case is, what is the ordinary course of the Court with reference to the administration of estates, subject to mortgages, created by the testator, or constituting the testator's debt ?

Judgment.

Under ordinary circumstances, if a suit is instituted for administering real or personal estate of a testator, and for carrying the trusts of his will into effect, if there is nothing special in the will, the ordinary course is to

(a) 5 Ves. 99.

(c) 1 K. 333.

(b) 2 J. & Lat. 141.

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have the personal estate administered in the payment of debts, and if that is not enough, then to have the real estate administered; and in the course of administration to have the real estate discharged of the incumbrances upon it; I mean those which are the debts of the testator; that is the general course of proceeding; and the general right of the parties interested in the real estate, if it is given without any special directions to one for life with remainder over, is that any or all parties have a right to have the estate discharged, by payment out of the personal estate first, and then by sale of the real estate. Then the next question is, whether the will contains any special directions inconsistent with the general abstract right. In this case the will is peculiar; the testator has thought fit to direct a different course as to the application of his property, from that which the Court would direct. He first devises all his estates to his trustees.—[His Honor stated the devise.]—The only devise to the trustees is during the lives of the Petitioner and his wife; then, after the death of the survivor, he devises the legal estate to the sons of his daughters in tail male, &c., but he charges on his real estate certain debts by way of mortgage; the trusts to receive the rents during the lives of the Petitioner and his wife are to pay his debts, *to keep up the mansion, &c.*, and then out of the surplus to pay the annuities, so that during the lives of the annuitants if it was necessary to apply the rents in rebuilding, that was to be done before paying the annuities, which are only to be paid out of the surplus, and then he gives directions about his personal estate. It turns out that the personal estate was insufficient, and the effect is this, that, after exhausting the personal estate, the mortgage debts remained unsatisfied; the result is, that it leaves the mortgage debts to be dealt with according to the ordinary rule as to

charges on the real estate; the tenant for life must keep down the interest, and the *corpus* is charged with the principal.

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Is there, then, anything in this will showing that the testator intended that the mortgage debts should remain a charge? in other words, that a portion of the property yielding a small income should remain intact for the benefit of the remainderman. I cannot say that I find any such indication of intention. I do not think the testator intended that the rents and profits should be applied in payment of his mortgage debts, and these are the debts of the testator.

The Court directed an inquiry what portions of the real estate it would be fit and proper to sell to pay off the mortgage debts.

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1858:  
March 12.

*Pleading.*  
*Exceptions.*

### BLECKLEY v. RYMER.

A bill alleged that money had been placed in the hands of Defendants for certain payments, and inquired into the application of such money. The answer averred that the particular sum had been, by agreement, placed in the hands of the Defendants *without recourse from Plaintiff*, and submitted that no discovery could be asked. Held, that all the circumstances might be essential in deciding the construction of the agreement, and the answer was insufficient.

THIS case came on upon exceptions to the answers of the Defendants *Rymer* and *Murray*, which were alike on the principal exception.

The bill was by *Henry Bleckley*, one of the promoters of the “*Western Bank of London*.”

It stated that the Plaintiff and two of the Defendants, *Gillan* and *Coleman*, were the promoters of the bank; and that they incurred considerable liabilities, and were at great personal trouble in endeavouring to form it, and to procure eligible persons to be directors.

That great difficulty was experienced in procuring eligible persons to become directors, and ultimately it was agreed between the promoters and *Rymer*, one of the Defendants, that a certain sum should be paid to certain persons considered eligible, in order to enable them to purchase shares to be qualified as directors. [This species of transaction is throughout the pleadings expressed by the term of *qualifying*, and *qualification* of the directors.]

The bill stated that twelve persons were ultimately found to act as directors, and the Defendant *Rymer* was instructed as the solicitor of the promoters to prepare a deed of settlement and obtain a charter. It then stated, that at a meeting of provisional directors, it was resolved “that in consideration of the time

bestowed, and the sums disbursed, and the liabilities incurred up to that time (the 21st of January, 1856) by the promoters of the bank in its formation, the sum of 6,000*l.* be awarded to them, to be paid on their behalf to Messrs. *Rymer & Co.* out of the funds of the bank, when it is fully constituted." And this resolution was duly confirmed after the formation of the bank. The bank was formed under a deed of settlement dated the 30th of March, 1856, and under a charter dated the 31st of May in the same year. The 6,000*l.* was paid by the bank, by the direction of the promoters, as to 3,000*l.* by a cheque to *Rymer*, and as to 3,000*l.* by a cheque to the Plaintiff, who afterwards paid it to *Rymer*, as was alleged by the bill, on the express consideration "that one thousand pounds part thereof should be applied in qualifying two directors, and that the residue should be applied for the benefit of the Plaintiff and the two Defendants *Gillan* and *Coleman* as promoters."

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The bill alleged that *Rymer & Co.* set apart 2,000*l.* to qualify four directors ; that 1,200*l.* was divided between certain persons employed by the promoters ; that the sum of 800*l.* was retained by *Rymer & Co.* on account of their own expenses ; that the sum of 2,000*l.* only was divided between the Plaintiff and the Defendants *Gillan* and *Coleman* ; and that three of the directors intended to be qualified refused or returned their qualification. And it charged that *Rymer & Co.* then retained in their hands 1,500*l.* or that value in shares, which the Plaintiff claimed on behalf of himself and the Defendants *Gillan* and *Coleman*. Certain of the interrogatories were addressed to this transaction and required minute discovery whether 2,000*l.* was or not applied in qualifying the four directors named, and



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whether they or some of them had not refused or returned their qualifications, and how in fact the money had been applied. The answers of the Defendants *Rymer* and *Murray* having previously stated circumstances, showing that *Rymer & Co.* had been at great expenses, and had had no adequate remuneration, and that the Plaintiff was aware thereof, and in particular, that the promoters were aware of *Rymer* having personally engaged to qualify certain directors, set up the following defence:—that, on the 10th of June, 1856, a meeting took place between the Plaintiff and *Coleman* and *Rymer* and his partner, and the mode in which the said 6,000*l.* was to be divided and appropriated was discussed and agreed to, and it was deliberately and after a good deal of discussion agreed between the Plaintiff and *Coleman*, and *Gillan* afterwards assented to that agreement, that out of the sum of 6,000*l.* there should be paid to *Gillan* 900*l.*, to *Coleman* 500*l.*, to the Plaintiff 500*l.*, to the subordinate agents of the three promoters sums amounting together with the three previous sums to 3,680*l.*, and that the residue of the said sum of 6,000*l.*, being the sum of 2,320*l.*, should be retained by *Rymer & Co.*, they accepting the same in full satisfaction and discharge of all the claims for their costs and expenses in respect of the engagements which they had entered into as aforesaid; and the Plaintiff and *Coleman* then drew up and signed a letter addressed to *Rymer & Co.*, which was afterwards signed by *Gillan*, as follows:—“We, the undersigned, agree and authorize you to distribute the money received from the Western Bank of *London* for the benefit of the promoters in the following proportions [then followed the sums above stated amounting to 3,680*l.*], and the remaining amount to be under your own control and discretion, *without recourse from us.*” The Defendants submitted that the Plaintiff

bad no right under that state of things to any discovery with reference to the application of the 2,320*l.*, and to that an exception was addressed.

*Mr. Greene* and *Mr. Hallett* for the Plaintiff.

*Mr. Glasse* and *Mr. G. L. Russell* for the Defendant *Rymer*.

The letter of 10th of June, 1856, protects us from answering the interrogatory. The whole case turns on that letter and the agreement between the promoters. They agreed to divide 3,680*l.* between them, and that was paid. They agreed to leave 2,320*l.* in the hands of *Rymer*, without recourse from them, that is, that they were not further to question it. If that, which is our construction, if that is right, they have no further business with the application of it; it is ours, to do as we like with, subject only to our own arrangements with other parties than the Plaintiff. If the letter does not make over the fund to us to be disposed of at our discretion, then we admit it belongs to the Plaintiff, and we will pay it over to him. But there is really nothing to decide but that single point, and how can it be material to the decision of that point, who are the persons whom we are alleged to have qualified. Suppose the money has been employed in qualifying directors, how does that help the Plaintiff? He cannot found a decree on that.

*Mr. Baily* and *Mr. Murray* for the Defendant *Murray*.

The VICE-CHANCELLOR, without calling on the Plaintiff to reply, said :—

There is no doubt that if any discovery is asked that is immaterial to the issue, it is not necessary for the

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Defendant to give it; but it is equally clear that if the matter as to which discovery is sought may be directly or indirectly material for arriving at a decision, the Defendant must give the discovery. If the Defendant means to say that on the face of the bill the discovery is immaterial, he should have demurred. If his case is that the bill omits a material fact, and that fact shows the discovery to be immaterial, the Defendant should have pleaded, but in this case he had not pleaded; he has answered, and his contention is this: he says 6,000*l.* came to the hands of his firm; there were several persons who as promoters were to have different sums, amounting in the whole to 3,680*l.* That left a sum of 2,320*l.*, and the answer suggests that out of that a sum of about 800*l.* was intended to be applied by way of qualification of four gentlemen for the office of directors; and that all the rest of the 2,320*l.* was agreed to be left in the hands of *Rymer & Co.*, to meet their own expenses and engagements; and the Defendant says by that agreement, and by the letter of 10th of June, 1856, "you have given up all interest in the matter; you have no further concern with it." The Plaintiff says that in his view of the case the Defendants were only to have the 2,320*l.* for the purpose, among others, of qualifying the directors. It was not intended that the Defendants should have it if not so applied, and that if any part was not so applied, it belongs to the Plaintiff; and the Plaintiff requires to know what out of the 2,320*l.*, was set apart and applied for qualifications. Was a certain amount of shares bought for Director *A.*, and did he refuse them, and did not the Defendant sell those shares; and did not Director *B.* say he would not have any shares bought for him?

Now is that not material to the decision of the cause?

It is argued that the whole turns on the construction of that letter, but I cannot decide that now; and in order to construe it, must I not know all the circumstances under which it was written? Can I say that it will not assist me in construing that letter, and deciding the cause, to have it shown that there is money unapplied in qualifications? I think the discovery is material, and the exception must be allowed.

[The other exceptions were of a technical character, involving no general principle of pleading.]

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PARTINGTON v. REYNOLDS.

**THIS** case came on upon a summons adjourned from chambers, in a suit commenced by summons.

The application was to have inserted in the decree, under the 20th Order of 16th October, 1852, a direction for an account on the footing of wilful default, and the sole question was whether that could be done.

Mr. *Baily* and Mr. *Sheffield* for the application.

We admit that the course of practice has been that you cannot on the further consideration of a decree made on an administration summons, have any declaration charging the Defendant with wilful default. That is sufficiently hard upon the Plaintiff, who in a suit so commenced, has no opportunity of alleging wilful default before the decree. For as there is neither bill nor any other pleading on the part of the Plaintiff, and

Feb. 18.  
March 16.

Pleading.  
Practice.  
Orders.

When a decree for the common accounts has been obtained on an administration summons, the Court has no power, under the 20th Order of 16th October, 1852, to vary or add to the decree in chambers by directing an account for wilful default.

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no answer, the Plaintiff cannot know or even suspect wilful default, till the accounts taken under the decree show it. It might therefore have been thought that the Court would not apply to a suit commenced by summons the rule applied to suits commenced by bill; a rule founded on this, that the Plaintiff there has an opportunity of charging wilful default by his bill, or by an amended bill, and cannot be heard afterwards, to seek a decree upon it, if he has neglected to charge it. However the course of practice is otherwise. But the reasons above mentioned are strong to show that under the Order of 1852, the Court may vary the decree by introducing the account we ask.

The Court may direct further inquiries or accounts. The language is general; not limited to accounts *ejusdem generis*. If the Court cannot in such a case as this direct the account asked for, what is the result? Why, that a distinct bill in aid of the decree must be filed. Why should the Court take that circuitous and expensive course, with no apparent effect except expense and delay. Nothing can prevent the Plaintiff obtaining the decree for inquiries as to wilful default, if he thinks fit to file such a bill. It cannot be pretended that a variation of the decree under the Orders would be a surprise on the Defendant, when it is from his own accounts that the wilful default appears, and he has abundant opportunities in chambers of rebutting it, if it can be rebutted.

*Wickens, contra*, did not argue, but suggested that the practice was settled, that you cannot so vary the decree in chambers.

*Mutter v. Hudson (a)*, and *Hodson v. Ball (b)*, were referred to.

(a) 2 Jur., N. S., 34.

(b) 1 Phil. 177.

The VICE-CHANCELLOR :

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Judgment.

In this case the representative of the next of kin of an intestate obtained, upon summons in chambers, under 15 & 16 Vict. c. 86, s. 45, a decree against the administrator in the usual form for the administration of the personal estate of the intestate. In the course of taking the account under that decree of the personal estate received by the administrator, the Plaintiff discovered reason to think that the administrator had been guilty of wilful neglect or default in not duly getting in or realizing some part of the personal estate; and he has taken out this summons, asking the Judge in chambers to make an order to take an account of what the administrator might, without his wilful neglect or default, have received. It is contended that such an order may be made under the 20th of the General Orders of 16th October, 1852. I am of opinion, that such an order cannot be made. But as a different opinion has been expressed, I will, out of respect to that opinion, state my reasons more fully than I should otherwise have done. And with a view to the interpretation of the General Order just referred to, I will first consider what were the rules and principles which, previously to the making of that Order, governed the practice of the Court, with respect to calling an executor or administrator to account, and about which there cannot, I consider, be the least doubt or question.

There are two different modes of accounting, to which an executor or administrator may be subjected by the Court, and accordingly there are two different forms of decree in use to compel him to account. The one is a decree compelling him to account only for what he has received of the testator's or intestate's personal estate;

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the other is a decree compelling him to account, not only for what he has received, but also for what he might, without his wilful neglect or default, have received, although he has not received it. These are two perfectly different decrees. It is not merely that the latter is a modification of the former; they are totally distinct from each other in principle. They proceed on totally distinct grounds. The one supposes no misconduct; the other is entirely grounded on misconduct. As the proposition, that these two decrees differ essentially in principle, lies at the root of the matter which I have to consider, I will quote the language of Lord *Lyndhurst* in *Hodson v. Ball* (a).

To obtain the accounts of what the executor or administrator has received, the Plaintiff (whether he be creditor or legatee or residuary legatee or next of kin), needs not to allege or prove anything special with respect to the personal estate of the deceased, or the dealings or intromissions therewith; it is sufficient that the Defendant holds the office of executor or administrator; to obtain the other decree, the Plaintiff must allege and prove that there is some part of the deceased's personal estate which ought to have been and might have been received by the Defendant, and which he has omitted to receive by his own wilful neglect or default. The former decree is therefore called, not only in the ordinary language of the profession, but properly and technically called, the *usual* decree to account; the latter is never so called, and it would be altogether inappropriate and wrong to apply to it that designation. Whenever the term "the *usual* decree" is used, it denotes exclusively that decree by which the executor

(a) 1 Phill. 177. (His Honor referred to the passage, p. 182.)

or administrator is required to account merely for what he has received.

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Now in proceeding against an executor or administrator by bill, whenever the usual decree only is made, the Plaintiff, in taking the accounts under that decree, cannot charge the Defendant with a single farthing beyond his actual receipts (of course I include in the term actual receipts, what may have been received by any other person by the order or for the use of the Defendant). The Plaintiff cannot be permitted to show that there is some part of the deceased's estate which the Defendant ought to have got in, and might easily have got in, and has failed to get in through his own wilful neglect or default, however gross and culpable may have been his misconduct in failing to get it in, or however clear may be the proof of it. Any such attempt would be instantly and peremptorily rejected. And for this purpose it would signify nothing, whether the Plaintiff was previously cognizant of the circumstances, or only discovered them in the course and by the means of taking the accounts under the decree. Nor would it for this purpose at all signify whether the bill had or had not prayed that the Defendant might account for what he might, without his wilful neglect or default, have received, the decree being only the *usual* decree. And after the account has been taken and the report made, when the cause comes before the Court for further directions, still the Plaintiff is precluded from obtaining an order on further directions to take an account of what the Defendant might, without his wilful neglect or default, have received; and this rule must inflexibly prevail, whether the bill had or had not prayed for it, and whether the Plaintiff was or might have been previously aware of the circumstances, or only disco-



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vered them by means of taking the account under the original decree.

These rules are perfectly clear and unquestionable; and they apply not only to the case where it is sought to make an executor or administrator account for what he might without his wilful neglect or default have received, but also to any attempt to make him accountable for any misconduct with respect to the personal estate, whether such misconduct amounts to actual fraud, or is a simple breach of trust or other mal-administration. In order to obtain a decree to make him account for any such misconduct, it must be alleged by the bill and proved at the hearing; and if the Plaintiff only obtains the usual decree, such misconduct cannot be noticed in taking the accounts under the decree, nor on the hearing of the cause for further directions. The only exception to this (if it be an exception) is, that the Court will, upon the hearing of the cause for further directions, entertain the question, whether the executor or administrator ought to be made liable for interest on balances improperly retained in his hands unproductive, although the original decree contained no reference to the matter.

It must not however be supposed, because a Plaintiff, who has obtained only the usual decree against the executor or administrator, cannot, either in taking the accounts under the decree, or on the hearing for further directions, charge him with what he might, without his wilful neglect or default, have received, that the Plaintiff is therefore remediless, if he discovers ground for so charging him. All that I am insisting upon is, that he has no remedy *in that suit*. If in the process of investigating the accounts under the usual decree in

that suit or otherwise, he discovers that the Defendant has been guilty of wilful neglect or default in getting in the assets, or of other misconduct, his remedy is by filing (with the leave of the Court) a supplemental bill, adapted to the purpose, which is to all intents and purposes a bill of review.

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Such being the rules of the Court when the proceeding is by bill, they are equally applicable where the proceeding is by claim. And until the Act for the Improvement of the Jurisdiction in Equity (15 & 16 Vict. c. 86), there was no other way of proceeding in this Court against an executor or administrator than by bill or claim. That Act introduced a new way of proceeding, viz., by summons in chambers. The 45th section enables any creditor, legatee, residuary legatee, or next of kin of a deceased person, to obtain by summons in chambers, without bill or claim filed, the *usual* order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case may require; and such order is to have the force and effect of a decree to the like effect made on the hearing of a cause or claim.

Now it is quite clear, and indeed it has been fairly admitted before me, that the only decree which can be made upon summons under this section of the Act, is the *usual* decree, that is, a decree that the executor or administrator shall account for the personal estate which has been received by him, and that it confers no jurisdiction to make on summons in chambers a decree that he shall account for what, without his wilful neglect or default, he might have received, or to make him accountable for any misconduct. The words "with such variations, if any, as the circumstances of the case may

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require," are only intended to enable the Judge to adapt the precise terms of the usual decree to the circumstances of the case, and not to enable the Judge to make a decree, which is not the usual administration decree, but which (as Lord *Lyndhurst* observes, in *Hodson v. Ball*) differs altogether in principle from the usual decree. If such a special decree is wanted, the party seeking it must proceed by bill, and he cannot obtain it upon summons. And, I believe, that not a single instance cou'd be found of such a decree being granted on summons by any one of the Judges. I have myself refused, over and over again, to make any but the usual decree, with such variations only as may be necessary to adapt it to the circumstances of the case.

Now when the usual decree has been made upon summons, that decree differs in no respect from a similar decree made upon bill. The proceeding to obtain the decree is indeed different, but such decree, when once made, is precisely the same, and stands on the same footing, and has the same force and effect, whether made upon bill or upon summons. Such decree, when made upon summons, is carried into effect, and the accounts directed by it are taken in precisely the same manner as would have been done if the decree had been made upon bill. The rules and principles which apply to such a decree, when made upon bill, apply to it equally when made upon summons; and it is no more possible in the latter case than in the former, either in taking the accounts under it, or on further directions, to attempt to make the Defendant account for wilful neglect or default, or any other misconduct, the decree being only the *usual* decree.

I consider, then, that at the time of issuing the

General Orders of 16th October, 1852, the following principles were well settled :—

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1. That a decree to make an executor or administrator account for what he might, without his wilful neglect or default, have received, is not only a different decree from the usual decree, making him account for what he has received, but a decree totally different in its principle : so different, that a bill afterwards filed to obtain an account of what he might, without his wilful neglect or default, have received (by which alone it can then be obtained), is not a mere supplemental bill, but a bill of review, which cannot be filed without the leave of the Court.

2. That where the *usual* decree only has been made, you cannot in any stage of that suit, or by any proceeding in it, graft on that decree the taking an account of what the Defendant might, without his wilful neglect or default, have received.

3. That when the *usual* decree has been made, it signifies nothing for this purpose, whether it has been made upon bill or upon claim, or upon summons in chambers.

4. That the only decree to make an executor or administrator account, which can be obtained upon summons in chambers, is the *usual* decree.

What, then, is the effect of the 20th of the General Orders of the 16th October, 1852? That Order is in these words :—“ If, in the prosecution of the order” (which word order includes decree and decretal order), “ it shall appear to the Judge that it would be expe-

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dient that further accounts should be taken or further inquiries made, he may order the same to be taken or made accordingly, or if desired by any party, may direct the same to be considered in open Court." And the question is, whether, under this Order, the Judge in chambers has power in prosecuting a decree to direct further accounts to be taken or further inquiries made, which are inconsistent with the principle of the decree he is prosecuting. I am of opinion that he has not, and that this is not a sound construction of the Order. Consider the consequences of such a construction. It is clear that this Order applies indiscriminately to the prosecution in chambers of any decree, of whatever nature or kind, and whether made upon bill or upon claim or upon summons.

If, therefore, the Judge has power to do this, when prosecuting in chambers a decree made upon summons, he must equally have power to do so when prosecuting a decree made upon bill; and if he can do so when the decree was made without opposition or discussion, he may equally do so when the decree was fully contested and strenuously opposed. So that, according to this construction of the Order, when the Court has, after full deliberation, founded on an examination of the pleadings and evidence in the cause, and the arguments of counsel, made a decree proceeding upon a certain principle, and directing certain accounts and inquiries in conformity with and for the purpose of carrying out that principle, the Judge in chambers, while prosecuting those accounts and inquiries, has power to direct other accounts and inquiries which are at variance with the principle of the decree, and which could only be justified by a decree founded on a totally different principle; in other words, the Judge in chambers prosecuting a

decree is, by virtue of this Order, armed with the power to do what, up to the date of this Order, could only be done by a rehearing or a bill of review, to reverse or vary the principle of the very decree which it is his function, sitting in chambers, to prosecute. Now this is in truth what I am asked to do by this summons. Here is a decree founded on a certain principle, viz., the *usual* decree for the administrator to account for what he has received. I am sitting as Judge in chambers to prosecute that decree. I am asked by the Plaintiff to make an order that the Defendant shall account not only for what he has received, which is in conformity with the principle of the decree that I am prosecuting, but also for what without his wilful default might have been received, which is totally at variance with the principle of the decree that I am prosecuting, and which could only be justified by a decree founded on quite a distinct principle. If I can do what is asked, while prosecuting this decree, which has been made on summons, I can equally do so when prosecuting a similar decree made upon bill, for the 20th Order is equally applicable to both; and if I can do so in a case where the Plaintiff only asked by his bill for the usual account, I can equally do so in a case where the Plaintiff by his bill asked for an account of what might have been received by the Defendant without his wilful default, and failed to obtain it at the hearing, for the language of the 20th Order is just as applicable to the one case as to the other. And if I can do that, I can, when sitting in chambers, without a bill of review or even a rehearing, reverse in effect the decree made by the Court on the hearing of the cause, and substitute for it a decree founded on a different principle. Such a result as this would of course be rejected by every one; and yet it is a legitimate deduction from the

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interpretation sought to be put upon the general language of the 20th Order by the Applicant for this summons. There is another obvious anomaly which would result from this construction of the Order. It will of course be admitted that when a creditor or other party first applies by summons in chambers for a decree to administer the personal estate of a deceased person, the only decree which can be made is the *usual* decree: the Judge has no jurisdiction to make a decree to take an account of what the Defendant might without his wilful default have received, even though the clearest proof be adduced before him of the most culpable default; the 45th section of the 15 & 16 Vict. c. 86, which alone gives the Judge power to make any decree at all in chambers for administration, is too precise and clear to admit of a doubt on this point, and it was fully admitted in the argument before me. Then what a strange anomaly it would be that the Judge, though absolutely precluded from making such a decree on the first summons, should yet have power upon a second summons to engraft such a decree upon the proceedings in chambers, under the usual decree, which he has made upon the first summons. It is impossible, I think, to put upon the language of the 20th Order, though that language is general, an interpretation which leads to such results as these. Such could not have been the intention of its framers. I know that it is of small account for me to say that, having myself assisted in the preparation of the Orders of 16th October, 1852, I had no conception that any one of those Orders could bear such an interpretation, or to say that I am persuaded that no such idea was contemplated by any one of the other Judges who were parties to the framing of them. Those Orders must, of course, be taken as they stand, and construed like any other

Orders. And thus construing this 20th Order, it appears to me that the sole object and purpose of it is, that if, in prosecuting the accounts and inquiries directed by the decree, the Judge thinks that it might enable the Court, when the cause comes on for further consideration, to make a complete and final decree without the necessity of referring it back to chambers for further accounts or inquiries, he may proceed at once to direct such further accounts or inquiries to be made or taken. The design was to enable the Judge in chambers to do in aid and furtherance of the decree that which the Court would otherwise direct to be done upon the cause coming on to be heard for further consideration; and as upon the cause coming on for further consideration the Court could not direct any further account to be taken or inquiry made which would be at variance with the principle of the former decree, so neither can the Judge do so when prosecuting that decree in chambers. In fact, the object of the Order was to meet an inconvenience of not unfrequent occurrence:—it sometimes happens that a decree has omitted to direct some specific account or inquiry, either from inadvertence or from its utility not being apparent at the hearing of the cause; such, for example, as a class inquiry, or some subsidiary account which might be auxiliary to the account directed by the decree. In any such case, previous to the Orders of 16th of October, 1852, if in the course of the proceedings under the decree in the Master's office it became apparent that such additional account or inquiry would be useful for the purposes of the decree on further directions, and that the case presented by the report would be incomplete without it, it was necessary either to go back to the Court by way of rehearing to get the desired direction inserted in the decree, or else to wait till the cause should come on for further directions, and

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by the decree then made to have it referred back to the Master to take the additional account or make the additional inquiry. The purpose of the 20th Order was to obviate that sort of inconvenience, and nothing else. The further accounts or inquiries which the Judge is thereby empowered to direct to be taken or made, must be such accounts or inquiries only as are auxiliary to the final working out of the decree which has been pronounced by the Court, and not such as are at variance with its principle.

That such is the true construction of this Order is I think confirmed by this further consideration. The Order must, of course, be construed with reference to the authority under which it was made, and it ought not to receive such a construction as would cause it to go beyond the scope of that authority. Now the Orders of the 16th of October, 1852, of which this Order is one, were not made in pursuance of the Act for amending the practice and course of procedure in the Court of Chancery (15 & 16 Vict. c. 86), but in pursuance of the Act for the abolition of the Masters' Office (15 & 16 Vict. c. 80); and the authority by which these Orders were made is given by the 38th section of the last-mentioned Act, which directs the Lord Chancellor, with such consent as therein mentioned, to make and issue General Rules and Orders for regulating the times, and form, and mode of procedure before the Judges sitting in Chambers and their Chief Clerks, and generally the practice of the Court in respect of the matters to which the Act relates. The Orders which are thus authorized to be made are confined to the matters to which the Act relates.

Now (with the exception of the clauses for appointing a third Vice-Chancellor, and the clause authorizing the

Lord Chancellor after resigning the great seal to give judgment in any case previously heard by him) the Act relates exclusively to the abolition of the office of Master, and to the transfer of the prosecution of decrees and orders, and other matters and things previously under the management of the Masters, to the Judges sitting in chambers, and to the machinery for effecting these objects. The sole purpose of the Act was to give to the Judge in chambers, instead of the Master, the prosecution of decrees and orders made by the Court, and to confer on him such powers as might be proper for their due prosecution. And it was not a purpose of the Act to give to the Judge in chambers any power to alter or depart from the decree which by the Act he is required to prosecute, or to direct any account or inquiry to be taken or made which should be at variance with its principle. Therefore, by construing this 20th Order as enabling the Judge in prosecuting a decree in chambers to direct any further accounts or inquiries to be taken or made which are in conformity with its principle and will assist in finally working it out, the Order comes within the scope of the authority given by the 38th section of the Act; but if the Order is to receive the construction insisted upon by this summons, then it is an Order which there was no authority to make. And even if it should be thought too strong a proposition that such an Order would be absolutely beyond the scope of the Lord Chancellor's authority under the Act, this, at all events, can hardly be denied, that it is utterly improbable that the Lord Chancellor, intending to make a set of Orders for the purpose of working out the objects of the Act, should introduce there one Order having for its object a matter which was not in the least degree contemplated by the Act. The effect of such an Order would be to overturn and change the very principle by which the Court is

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governed with respect to decrees; and if it had been intended to do so, the Order would not have been thrust inappropriately into this set of Orders, but would have formed one of the Orders of 7th of August, 1852, made in pursuance of 15 & 16 Vict. c. 86, which was the Act for amending the practice and course of procedure in the Court of Chancery.

I have thus stated the reasons which induce me to arrive at the conclusion that the Judge cannot, in prosecuting the *usual* decree against an executor or administrator, *i. e.*, the decree that he shall account for what he has received, engraft upon it an order to take an account of what he might without his wilful default have received, or to make him accountable for any other misconduct, and *that*, whether the usual decree was made upon bill or summons. A different opinion, however, has been expressed by one of my learned colleagues, for whose judgment I entertain so much respect, that, notwithstanding my own decided views on the subject, I should have felt greatly disposed to defer to his judgment, especially as it is of great importance that the proceedings and practice in the Judges' chambers should be uniform. But as uniformity of practice in two of the Judges' chambers would be of no value if it did not extend to all the four, I thought it right to ascertain what practice had been adopted on the point in question in the chambers of the other two Judges, or at least what were their opinions as to the practice which ought to be adopted with reference to the matter now under consideration; and upon consulting them, I find that their opinions coincide with my own. I cannot, therefore, hesitate to decide this case in accordance with my own views, when I find them so confirmed.

The summons will be dismissed without costs.

*Re* DEWELL.

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March 22.

*Crown.*  
*Administration*  
*Bona vacantia.*

**THOMAS DEWELL** died intestate before the year 1826. At the time of his death no next of kin were forthcoming, and Mr. *Maule*, the solicitor to the Treasury, obtained, on the nomination of the Crown, administration to the intestate's estate. The clear amount that came to his hands was 2,064*l.* 7*s.* 1*d.*, which, under the then existing law as to the personal estate of intestates dying without next of kin, he paid over in 1828 to the king's proctor for the king's use, that is to say, for his privy purse.

Afterwards, a suit of *Edgar v. Reynolds* (the Defendant *Reynolds* being the successor of Mr. *Maule*) was instituted by persons claiming as next of kin, and in *January*, 1858, it was certified that they were next of kin, and that the balance in the hands of the Defendant *Reynolds* was 2,064*l.* 7*s.* 1*d.*

The cause now came on for further consideration. The Crown was ready to pay the balance, and the only question was, whether it was bound to pay interest from the time when there was a clear balance in the hands of the administrator, which it appeared was some time in 1827.

Some part of the fund had consisted of bonds and other inconvenient securities producing income, which

On the death of an intestate no next of kin appeared. The Crown nominated the Crown solicitor to take out administration; the administrator held the fund, paid all outgoing, and, after a certain time, handed over the fund to the king's proctor for the use of his majesty; afterwards the Plaintiffs established their title. Held, that the Crown must restore the fund, with interest, the interest to be computed from the time when all payments on the part of the estate had been made.

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had been sold out by the administrator, and some parts of stock, which was also sold.

Mr. *Glasse* and Mr. *Prendergast* for the Plaintiffs.

The administrator nominated by the Crown stood in exactly the same position as any other administrator; he was bound to hold the fund for the rightful owners, and to invest it, and if he paid it over to parties not the rightful owners, he must account to those whose title is now established for interest as well as for principal. *Turner v. Maule (a)*, *Kane v. Reynolds (b)*.

The *Solicitor-General* and Mr. *Wickens* for the Crown.

*Turner v. Maule* is no authority for the Plaintiff. In that case, the only part of the property on which the Court gave interest was a small portion invested in the funds and sold out. As to the rest, which was on bonds and other securities such as here, which the Crown is not bound to hold, no interest was given. But the argument of the Plaintiff proceeds on the supposition that the Defendant is a common administrator. That is not so; he is administrator as nominee of the Crown, the party entitled while the property is *bona vacantia*. As representing the Crown he is not bound to make interest of the money; the Crown holds it for itself, if there be no next of kin for the next of kin when they are ascertained. But the Crown cannot be a trustee, and has none of the duties of a trustee. The Crown is not bound to invest or to make the money fruitful; and if the Crown is not, how can the Defendant, who is merely the agent of the Crown, be so?

(a) 3 De G. & Sm. 497.

(b) 2 Sm. & Giff. 331.

*Dyke v. Walford* (a), *Meador v. M'Ready* (b), *Brugere v. Pemberton* (c), *Gallivan v. Evans* (d), *Milland v. Gray* (e), were also cited.

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*Mr. Glasse* in reply.

The fallacy on the other side is in treating this as *bona vacantia*; *bona vacantia* is where there is no owner, not where the owner is merely unknown. When the Plaintiffs were proved to be next of kin, they were entitled from the decease of the intestate, and the Crown had no title whatever. The administrator was administrator not for the Crown, but for the real owner, and must account to the real owner just as if he had held the fund in his own hands. He must seek his indemnity from the Crown.

The VICE-CHANCELLOR :

None of the cases that have been cited exactly govern the case now before me. *Turner v. Maule* might have decided it, but did not. The question there raised by counsel was not on the footing of the administrator retaining funds in his hands unproductive, but of a sale of stock at a given period, and the Court said there was a question whether if stock, producing of itself income, was sold without reason, the administrator must not pay interest; therefore the Court said, will you be satisfied with interest on that fund; and, not expressing any opinion on the abstract question, the Court held, that on such a fund interest was payable.

Judgment.

It appears to me that where, as in this case, any

(a) 5 M. P. C. 434.

(d) Ball & Beattie, 191.

(b) 1 Mol. 119.

(e) 2 Col. 295.

(c) 12 Ves. 386.

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person is nominated by another, such as here, the solicitor of the Crown nominated by the Crown, as the person to whom the Crown directs administration to be granted, the letters of administration expressing that it is to the use of such person, he is to all intents and purposes administrator. It is exactly the same as if a person entitled to administration, being abroad, appoints an agent, authorizing the Court to grant administration to that person. There the form is—[His Honor referred to *Chambers v. Bicknell (a)*], — and the form of the administration granted to the nominee of the Crown is, it seems, the same. That is the exact form of letters of administration to the nominee of the Crown, when the Crown is beneficially entitled. Now it has been determined, that when administration is granted to a person as nominee of a party abroad, who is entitled to administration, such administrator is, as to the claims of third parties, administrator to all intents and purposes, exactly as if the person entitled to administration had himself obtained it.—[His Honor here referred to the judgment in *Chambers v. Bicknell (b)*.]—That is a clear decision, that the person to whom administration is granted, on the nomination of the party entitled to it, is full administrator, exactly as if he had obtained administration in his own right, as regards the claims of other persons.

It appears to me that that foundation being laid, I cannot distinguish between that case and this, where administration is granted to *Reynolds*, as nominee of the Crown, the form of administration being the same, the purpose being the same. When the administrator is once constituted, he is liable to all claims

(a) 2 Hare, 537.

(b) 2 Hare, 538.

by persons who are entitled to claim against the estate.

That foundation being then laid, we come now to the circumstances of this case. At the time this administration was granted, it was supposed that there were no next of kin, and on that assumption the Crown was beneficially entitled to this estate; and being so entitled, the Crown was entitled to nominate an administrator. In point of law, the sovereign was himself the party entitled to administer; and in this particular case, at that time, the sovereign was personally interested; the public had no concern in the matter; but that makes no difference in the principle. Now the Crown being so entitled, it is argued, that *Reynolds* was merely the agent of the Crown, and in one sense he was so; the Crown, being entitled to administer as being beneficially entitled, appoints this person, and he is accountable to the Crown; and if it turned out that there were really no next of kin, the Crown might treat him as accountable as its agent. There can be no reason to doubt that the Crown might file a bill against him and third persons (such as next of kin, if there are any), who have a right to treat him as administrator.

Then it was argued that a duty is cast on the Crown to take possession of property under such circumstances. How is any such duty cast on the Crown? If there were any rule of law that imposed on the Crown a duty, when a person dies intestate, to take out administration not for its own benefit, that would be different. But here it was, if there were no next of kin, the property of the Crown; how can it be any duty in the Crown to enforce its own rights? If it had been the property of the public, there would be

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no doubt a duty to take possession of the property for the public, but that is no duty towards the next of kin. If the Crown had not thought fit to take out administration, the next of kin could not say the Crown had neglected any duty. Regarding then the Defendant as properly administrator, what is the rule of this Court? Why, that, in the absence of any special direction, it is the duty of an administrator to invest any sums of sufficient amount. He has no right to have money, as it were, wrapped up in a napkin, and still less to put it in his own pocket, or gain any benefit by it; if he does, the parties entitled to it have a right to say that he shall be charged with interest. No doubt, if there are payments to be made, he is justified in keeping balances adequate for those payments.

I cannot distinguish this case from that of an ordinary administrator. In fact, Mr. *Maule*, at a certain period, handed over the fund to the King's Proctor. Now suppose this was the ordinary case of an administrator, or an executor, where there is intestacy as to the residue; and suppose that A., claiming to be next of kin, asks that the fund may be handed over to him: the administrator or executor would be entitled to say, "I cannot recognize your right; if I do, I expose myself to responsibility, and therefore I must institute a suit." If that is done, however wrong A.'s claim might be, the administrator would be safe. But if without a suit he hands it over to A., he takes the responsibility of being liable to the persons really entitled. Or he may take another course; he may pay it and take an indemnity, but if he does so, and it turns out that somebody else is really next of kin, he remains liable. Now it appears to me that the position of *Reynolds*, as administrator, is precisely analogous to that of an administrator

who has handed over the fund to a person supposed to be entitled, subject to an indemnity. In this case, the sovereign has, on his own account, or on behalf of the public, had the use of the property, and the sovereign or the public is responsible, and therefore it appears to me that there is a liability to pay interest.

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As to the period from which interest should be charged, his Honor observed, that by the end of 1827 all payments appeared to have been discharged, and from that period there could be no necessity for retaining balances, and interest must therefore be paid from that period.

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EDMUNDS v. WAUGH.

May 29.

**T**HIS was a summons adjourned from chambers, and the question argued turned on the will of *George Waugh*, deceased.

  
*Will.*  
*Construction.*  
*Condition.*

1. A will contained a bequest of 1,000*l.* on trusts, and of 5,000*l.* on trusts, and another bequest on trusts in which no sum was mentioned; but the language was continuous, and no actual blank was left. In another part of the will there was power to invest the said sum of 5,000*l.*, and *the said two sums of 1,000*l.**

Held, that the latter clause was evidence that the testator intended a bequest of 1,000*l.* in the bequest in which no sum was named.

2. Testator directed, that "within three months after his death, in case any child or children of his son should be then living, his executors should invest 5,000*l.* for such child, or, if more than one, for such children equally, of his said son as should attain the age of twenty-one." A subsequent clause was to this effect:—"And in case no child or children of my said son shall at my decease have attained, or shall afterwards attain, the age of twenty-one years," then over.

Held, that the first clause was not a condition precedent, but merely pointed at the time of investment; and that, though the son had no children, the fund must be invested.

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The testator after certain bequests, and among others making a provision for *Henry Anthony Slade*, went on thus,—“ And whereas in the likely event of the decease of the said *Henry Anthony Slade* without leaving lawful issue who shall then have attained the age of twenty-one years, I am desirous of making some provision for his present wife *Maria Slade* in case she should survive him. Now, I do hereby direct my said trustees and executors in such last-mentioned two events, out of my residuary personal estate, to purchase and invest in their names, or to transfer into their names from my name, within three months next after the happening of such two events, and to stand possessed of the dividends thereof in trust to pay the same unto the said *Maria Slade* during the remainder of her natural life” for her separate use &c.


It will be observed that no trust sum is here named, and on this the first question arose, whether the blank could be supplied.

The testator also gave a particular sum of 1,000*l.* and a particular sum of 5,000*l.* upon trust; and in a subsequent part of the will powers of investment were given to the trustees with respect to the bequest of the 5,000*l.*, and with the consent of the person or persons entitled for life, with respect to *the said two sums of 1,000*l.**

The second question turned on the following passage, “ I further direct my said trustees and executors within three months after my decease, in case any child or children of my aforesaid son shall be then living, out of my personal estate to purchase or invest in their names, or to transfer into their names from my name,

the sum of 5,000*l.* Bank £3 per Cent. Consolidated Annuities or the like sum of Reduced £3 per Cent. Annuities, and to stand possessed thereof upon trust for such child, or if more than one for such children equally, of my said son as shall attain the age of twenty-one years. And I direct that the same and the dividends, interest and annual produce thereof to accrue due thereon in the meantime shall become vested in and transferable and payable to him, her or them respectively at such age of twenty-one years. But I, nevertheless, also direct and declare that it shall be lawful for my said trustees in their absolute discretion, and whether my said son shall at my decease be living, and whether he shall be able or willing, or unable or unwilling, or whether, if then dead, he shall have left any maintenance for his issue under the age aforesaid or not, to apply all or such part as my said trustees shall from time to time think fit of the dividends, interest and annual produce of the expectant share of any child or children respectively of my said son in the said last-mentioned sum of Consolidated or Reduced Bank Annuities, in or towards his, her or their respective maintenance, education, or other benefit. And in case no child of my said son shall at my decease have attained, or shall afterwards attain, the age of twenty-one years, then I direct that the said last-mentioned sum of Consolidated or Reduced Bank Annuities, and the unapplied dividends and annual produce thereof, shall fall into and become part of my residuary personal estate.

It was contended on the one side by the executors, that the words "within three months after my decease, &c." were not a condition precedent, governing the title of children of the son, and requiring that they should be living within three months after the testator's death ;

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but that all the son's children whenever born were to take, and that the direction first given was only a direction to accelerate investment, in order to make at once a provision for children then living, if there should be any.

The parties entitled to the residuary estate contended that the words created a condition precedent, and that as there were no children of the son, the trusts for investment did not arise.

Mr. *Smythe* for the Plaintiffs, the executors.

Mr. *H. C. Ward*, for the residuary legatees. *Hunt v. Hort* (a), and *Newburgh v. Newburgh* (b) were cited on the first point.

The VICE-CHANCELLOR :

Judgment.

It is clear as a general rule, that you cannot interpolate words in a will, or arrive at the intention of the testator, from any evidence *dehors* the will. You may have evidence of the surrounding circumstances under which the testator made his will, but not of his intention; and therefore you cannot have evidence of anything to show that, there being a blank in the will, the testator intended to fill it up in a particular way. You must for that purpose look only at the will itself. Now one thing is clear in this case: that it was not the intention of the testator when he wrote his will to leave a blank. The writing is continuous. In one of the cases cited, an actual blank was left; but here it is clear the testator supposed he had named a sum, and from accident omitted to do so. If, however, it stood

(a) 3 Br. C. C. 311.

(b) 5 Mad. 364.

there alone, I could not see anything in the will to show that he meant 1,000*l.*, or any other particular sum. But setting out with the assumption that the testator supposed he had put in a given sum, we then come to this :—Is there anything in the will by which I can be guided to the intention? Supposing that, after the passage where no sum is mentioned, he had gone on to say, “Whereas I have bequeathed 1,000*l.* (referring to the previous passage), now I direct, &c.” I think I could have no rational doubt that on the will of the testator itself there would then be a declaration of his intention. Now here we have not exactly that; but we have that which I think is tantamount to it. The testator has given 1,000*l.* on certain trusts; and another sum of 5,000*l.* on certain other trusts; and he has given a sum of nothing expressed, by accident; I assume, and I believe it is so, that he has given no other sums. Then in a subsequent part of the will he declares that it shall be lawful for his trustees to invest and vary investments, &c. as to the said sum of 5,000*l.*, and with the consent of the persons entitled for life, as to *the said two sums of 1,000*l.** Now what does he mean by the said *two sums*? He must have meant the sum of 1,000*l.* expressed as one of them, and could he have meant anything but the sum left in blank as the other? This passage leaves no doubt on my mind, that the testator believed he had filled in the blank with 1,000*l.* In adopting this view, I am acting entirely in conformity with the rule I have stated. I find on the face of the will itself sufficient indication of the testator’s intention to bequeath 1,000*l.*

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On the second point, it appears to me that the gift is not dependent on the accident of whether the son should or should not have children living at the tes-

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tator's death. The passage in the will is capable of two constructions: it may mean that only in the event of some children of the son being alive at the end of three months after the testator's death the sum is given; or it may mean, not that the direction to invest is dependent on any of the children of the son being living, but only to direct, in the event of any children being living, an early period of investment.

Let us see, however, what are the purposes of the trust, and who are the persons to be benefited. For whom did he mean the 5,000*l.*? According to the language of the will, he intended not merely that if any child of his son should be living at the end of three months after his decease, but that if there should be any child whatever of his son, the money was to be invested. All the children of his son living at his death, and any after-born child of his son, would be entitled. The testator meant to benefit all the children of his son whenever born. Having given a direction for investment, and having declared for whose benefit it was to be, he goes on to provide for there being no such objects, and then declares that the gift over is to depend on there being no child of the testator's son who at his the testator's death shall have attained or shall afterwards attain twenty-one.

This appears to me to put a construction on the first passage, and to show that the words "within three months after my decease," &c. are not to be taken as words importing a condition precedent, but are to be read as a parenthesis, and are indicative of an intention to point out the period of investment in the particular event of there being children living at his death. The £—— 5,000*l.* must therefore be invested on the trusts.

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June 8, 9, 10.

*Companies.  
Trustees.  
Power.*

WILKINS v. ROEBUCK.

IN this case the bill was filed by *Henry Wilkins* (a shareholder in "The Western Bank of London"), on behalf of himself and all others the shareholders in the Western Bank of London, except the Defendant, *John Arthur Roebuck* (the Chairman), against *John Arthur Roebuck*, *Henry Tucker Clack* and "The Western Bank of London."

The statements of the bill, so far as they are material to the principal question decided, were to the following effect:—

The Western Bank was established and incorporated on the 31st May, 1856, under a charter and deed of settlement, dated respectively the 31st May, 1856, and 13th March, 1856. The company commenced business as bankers on the 16th June, 1856. Before the complete establishment of the bank, negotiations took place between the provisional directors and the Defendant *Henry Tucker Clack* (then manager of another bank), with a view to engaging him as manager; and after some time he wrote to the provisional directors in the following terms:—

"Union Bank of London, *Regent Street Branch*,  
*Argyle Place*, 11th February, 1856.

"I am willing to accept the office of general manager

pay him 1,000*l.* a year for three years, such contract to be confirmed by the proprietary or a board duly authorized.

Held that the directors alone had power to confirm that contract by deed.

The deed of settlement of a banking company contained clauses, empowering the directors to pay and allow to the servants of the company such remuneration, salaries, and wages as the court of directors should think proper, and to confirm any contract and all acts done by persons acting as directors in relation to the formation and establishment of the company.

The provisional directors entered into a contract with a manager to pay him a salary, and if the bank should discontinue business before the term agreed upon, to

be confirmed



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of the Western Bank of London from the determination of my present employment, on the following terms :—

“The engagement to be for seven years, at a salary of 1,500*l.* free of income tax, to commence from the date at which my duties commence, together with a free residence, to be furnished by Mr. *Clack* at the expense of the bank, such expense not to exceed 800*l.*, the furniture to be and remain the property of the bank.

“The directors to have the power of dispensing with Mr. *Clack's* service, should a board specially summoned for the occasion, at not less than twenty-one days' notice, so decide by two-thirds of the members present; but such decision shall not be considered final until confirmed by another board, either special or general, the board paying to Mr. *Clack*, in the event of his dismissal (except for misconduct), two years' salary, viz.:—3,000*l.* Should Mr. *Clack*, either from ill health or from domestic circumstances, be compelled to retire, he shall be at liberty to do so after giving the board six months' previous notice of such intention, and binding himself in a penalty of 2,000*l.* not to accept any similar appointment. *Should the bank discontinue business before the expiration of the above term, Mr. Clack shall receive 1,000*l.* per annum for every year unexpired, not exceeding in the whole three years.*

“The agreement contained in this correspondence to be embodied in a more formal document, to be approved and settled by the solicitors of the bank and Mr. *Clack* respectively, and the directors to use their best endeavours to procure a confirmation of it by the proprietary or a board duly authorized: further than this, the directors not to be personally responsible to Mr. *Clack*.

"Although the salary given to Mr. *Clack* is confined hereby to 1,500*l.* per annum, the directors will be disposed to recommend that an additional income should be granted to Mr. *Clack*, when a dividend or bonus of upwards of five per centum shall be declared on the paid-up capital.

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"HENRY T. CLACK."

This letter was accepted by the provisional directors, and after the establishment of the bank, by the directors, as the basis of an agreement with Mr. *Clack*, and a draft of a deed in pursuance thereof was prepared by the solicitor of the bank, and by him sent to Mr. *Clack's* solicitor; and finally an agreement was settled between the solicitors of the parties, corresponding with the letter or preliminary agreement, and it contained among other clauses the following:—

*"And it is further agreed, that in the event of the said bank discontinuing their business before the expiration of the said term of seven years, then the said Henry Tucker Clack shall receive the sum of 1,000*l.* per year (in lieu of the said salary of 1,500*l.*) for every year unexpired, such compensation not to exceed in the whole the sum of 3,000*l.* And it is also agreed that in the event of the said Henry Tucker Clack being compelled through ill health or domestic circumstances to retire from the said office of general manager before the expiration of the said term, he shall be at liberty so to do on giving to the directors for the time being six months' previous notice in writing of such his intention, and entering into a bond to the said directors in the penal sum of 2,000*l.* not to accept any similar appointment. And it is also agreed that the directors shall have power*

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to dispense with the services of the said *Henry Tucker Clack* if they shall think fit; but to effect this object, a board shall be especially summoned at not less than twenty-one days' previous notice, and a resolution to that effect shall be adopted by two-thirds of the numbers present, and such resolution shall be confirmed at a subsequent board, either special or general, and in the event of such dismissal (except for misconduct) the said *Henry Tucker Clack* shall be paid the sum of 3,000*l.* by way of compensation."

This deed was duly executed on the 5th of May, 1858, by the chairman and another of the directors, in pursuance of a resolution then passed to that effect by a board of directors, at which thirteen were present and supported the resolution. No general meeting was consulted, nor was any individual shareholder as such, consulted. The execution of the deed was entirely the act of the board of directors; and the question was, whether a board of directors had power to bind the shareholders to a deed containing the clause above set out in p. 283.

The following clauses of the deed of settlement were referred to:—

10th. The affairs of the company shall be managed by the directors, under such superintendence and control of the general meetings of the company as are hereinafter provided for, and except so far as may by this deed or by law be otherwise provided, the directors hereby appointed or hereafter to be appointed shall, as respects all dealings with persons strangers to the company, or with shareholders in any other situation than as shareholders of the company, have and exercise

all and every the powers and discretion which they might have and exercise, and shall manage the affairs and trading and business of the company as if they were the sole partners in the company.

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49th. It shall be lawful for the court of directors, if they shall think fit, to give gratuities to any officer or clerk in the service of the company for good conduct and service.

54th. The court of directors for the time being shall have lawful power to appoint, remove, or change from time to time any general manager, secretary, manager, sub-manager, solicitor, or solicitor's clerks, officers, and servants, whether for permanent or special service, as the concerns of the company may from time to time require for transacting the business thereof, and subject as herein mentioned the court of directors shall in all things determine the duties and qualifications of all officers appointed by them, and shall from time to time pay and allow to the general manager, auditors, secretary, sub-manager, solicitor, or solicitor's clerks, officers, and servants, such remuneration, salaries, or wages, as the court of directors shall think proper, provided, nevertheless, that for the dismissal or removal of the general manager, or of the first solicitor, the votes of a majority of not less than two-thirds of the directors present shall be necessary, and that a meeting shall be called for the express and sole purpose of considering the question of the dismissal or removal of the general manager or first solicitor, of which meeting, and of the object thereof, fourteen days' notice in writing shall be given by the secretary to each member of the court of directors, and also to the general manager or first solicitor, as the case may be, provided, that in case any general manager shall


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at any time be declared a bankrupt or insolvent, or be guilty of any misconduct, calculated in the opinion of three-fourths of the directors present at any court to endanger the safety of the bank, it shall be lawful for the court of directors forthwith to suspend such general manager.

56th. That the court of directors for the time being, at a general meeting convened for that purpose, shall have power to provide a superannuation allowance for the first or any other general manager, or other officer or clerk after twenty years' service, such superannuation allowance not to exceed two-thirds of the salary of such general manager or other officer or clerk at the time of his superannuation, and to be continued during the remainder of his natural life or otherwise; that any superannuation allowance may be provided for any general manager or other officer or clerk of the company, upon the recommendation of the court of directors, confirmed by a resolution or vote of any general meeting of the shareholders.

114th. It shall be lawful for the court of directors, if they shall see fit, to confirm and carry into effect any contract for the purchase or lease of any houses or offices, or of any land or ground, for the purpose of building houses or offices (subject to any limit to be fixed by the letters patent of incorporation of the company), either in fee simple or for any less estate which may have been entered into on behalf of the company, although by any person or persons not authorized so to contract; and also, if they shall think fit to confirm all acts done by persons acting as directors of the company in relation to the formation and establishment thereof, and to pay all costs, charges, and expenses incident to

such formation and establishment, including therein the expense of preparing and executing these presents.

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145th. And it is hereby agreed and declared that all and every the costs, expenses, or claims incurred, sanctioned by the court of directors of the said company, in or about the establishment thereof are hereby confirmed, and all the costs and expenses incurred in or about such matters as aforesaid may be paid by the said directors out of the deposits made on the said shares.

The case was argued on two grounds. First, that if the directors had power to enter in the deed so as to bind the shareholders, that power had not been well exercised; and this question turned entirely on the facts, and the Court was of opinion that the facts did not support the Plaintiff's case.

Second, that the deed was altogether *ultra vires*, and this was the only important legal question.

Mr. *Glaspe* and Mr. *Drewry* for the Plaintiffs, on the second point.

It is now well settled that directors of companies are in the nature of trustees, and that they have in general no powers, except under the deed of settlement. The question here is, therefore, and it is a pure question of law, Is there anything in the deed of settlement authorizing the directors to execute the deed, giving to the Defendant *Clack* an annuity for three years after the bank shall have discontinued business?

Now, in the first place this deed, like most other

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deeds of settlement, is throughout providing for the management of the business, on the footing of its being a continuing business; and though we do not mean to say that all powers whatever stop on the dissolution of the company, yet we do contend that after such an event, the powers only subsist for the purpose of, and so far as they are consistent with, the mere duty of winding up its concerns. And can it be said that the directors are, with a view to that, competent to make a provision for the manager after the dissolution of the bank, especially when to that provision are annexed no duties in respect of winding up the concern?

If then the deed contemplates generally the holding and exercise of powers by the directors for the purpose of managing the affairs of the company, let us see whether there is any clause in it at variance with that general intention, and contemplating a posthumous provision, without duties attached to it, for the manager.

The 10th clause, which is the clause of general management, speaks of managing "the affairs of the company," not of disposing of the personal assets of the proprietors after the death of the company; and all the powers given by that clause have reference to this; that is, to the *management* of the *affairs* of the company; and the latter part of the clause, which is the widest, still refers to managing "the affairs *and trading* and business of the company."

Now, if the deed stopped there, could it be contended that the directors would have authority to engage a servant at a salary to assist in the *affairs and trading* of the company, with an annuity of unlimited duration and extent, after those affairs and that trading had

ceased? For if the power exists at all, it must exist to an unlimited extent. If it exists, it must be founded on this, that it is part of managing the trading and affairs of the company to make a provision for any servant after the company is defunct; and is that, according to the custom of merchants, a power necessary and incident to the management of the affairs of a company?

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We contend that on this clause, if it stood alone, the directors were not intended to exercise any such power.

But other clauses of the deed show, by unavoidable inference, that such was not the intention of that clause. If it were, it is clear that the directors might provide a superannuation for any servant after length of service; a power much more essential to and much more usual in the conduct of a trading concern, than making a posthumous provision, without reference to length of service. But that the deed did not intend such a power to be exercised under the 10th clause is clear, because the 56th expressly does provide for it, and thereby excludes the presumption that it exists under the 10th. If then the 10th clause does not extend to giving a power to provide a superannuation, and that of a limited amount, how can it be contended that it includes the much larger power of giving a posthumous provision, without limit as to duration or amount?

Again, there is an express power in the 49th clause to give gratuities for *good conduct and service*; that that clause does not cover the present grant is clear, because it is limited to *good conduct and service*, and the present grant depends not at all on good conduct or service, but solely on the premature decease of the



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company. But the 49th clause shows this (like the 56th), that the parties did not intend the 10th clause to include even so small a power as that of rewarding good conduct and service by gratuities; otherwise the 49th clause would not have been expressly introduced—*a fortiori* the 10th clause did not contemplate the larger power.

We come now to the 54th clause, and again we contend that that clause has reference to the transaction of the business, contemplated as a continuing business, and does not extend beyond that, except for the purpose of winding up the business of the company.

The clause speaks of appointing such servants “as *the concerns of the company* may from time to time require for *transacting the business thereof*.” How can that be applied to appointing a servant after there are no concerns to transact?

Again, the directors are to determine *the duties*—that contemplates the existence of duties; not a state of things in which there are, or at least may be, no duties whatever to perform.

Again, the *directors* are from time to time to *pay or allow*; how is that language applicable to a state of things, when there is no company and no directors? and they are from time to time to pay and allow, what? *remuneration, salaries or wages*. Does either of these words, either in its legal, or in its commercial sense, extend beyond a payment for labour? If a clerk dealing with a merchant were to say, “I must be remunerated by 1,000*l.* a year,” would any one understand him to mean, that he must be guaranteed 1,000*l.* a year while


the concern lasted, and for the rest of his life if the concern terminated the next year? Remuneration means a return for service, and salaries and wages mean the same thing. In fine, this clause, we say, obviously contemplates the ordinary business mode of retaining servants for the work of the concern; and cannot by any stretch of imagination include a power for the directors, not themselves to pay as directed by the clause, but to render the private fortunes of the shareholders liable to pay wages, long after the concern shall have stopped, for an unlimited time, and for no duties at all.

The clause also contemplates payment by the directors, as such, out of the funds of the company, for its necessary business.

Try it this way. Will it be contended, that subsisting the company, the directors could under that clause direct the wages of servants to be paid by private contributions in the nature of a call, by the shareholders? If they could not, how can it be construed to give the directors to order such a payment to be made in such a manner, after the company has ceased to exist, and there are no duties to perform? It is clear that the clause contemplated payment out of the funds of the concern.

The next clause that will be relied upon is the 114th. Now that clause, we contend, relates to positive acts done, not to contracts of this nature, and it contemplates costs and expenses that have been positively and actually incurred in *the formation*; not contracts for any contingent and unlimited expenses to be incurred after the *cessation* of the company. The first part refers to contracts for purchase, &c.; to something essential for carrying on the business, and the other acts referred

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to must be taken to be *in pari materia*. But supposing this clause referred, if taken alone, to such an act as this, the 145th clause shows very clearly how the expenses of any acts are to be paid. They are to be paid out of the *deposits*; and therefore clearly it was not in the contemplation of the parties to give power to sanction any contract involving expense, except contracts, the expense of which was to be paid *out of the deposits*. Now this contract is to be fulfilled not out of *the deposits*, but after all the deposits are gone, after all the property is gone to pay creditors, out of the *pockets of the shareholders as private persons*.

But even assuming (which is taking the strongest view against the Plaintiff) that the 114th clause gave power to confirm *any contract* of the provisional directors, we must see what their contract was; for it is only *their actual contract* that can be confirmed; not a step beyond it. Now their only contract was the letter, and that was a conditional contract, and unless the conditions were complied with, the deed is not a confirmation of their contract, but a new contract.

Now by the terms of the contract it was to be confirmed by the proprietary or *a board duly authorized*. A board of what? and how *authorized*? The contract does not say a board of *directors*; it may mean a special board of proprietors; or it may mean a board of directors specially authorized by the proprietors. To say that it means merely a board of directors regularly convened, is to beg the whole question; to assume that such a board has the power—whereas the 114th clause would be useless, if such a board had the power. The contract must mean then some special kind of board; and has any such board confirmed the contract? No; the deed

then is not a confirmation of the conditional contract, but an independent deed, and if so, it must be supported by the deed of settlement, exclusive of the 114th clause, or it cannot be supported at all.

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Again, looking at the uncertainty of the language used in the contract, will not the Court say that it cannot discover what kind of board was meant, and therefore that the contract must be confirmed *by the proprietary*? We apprehend that is its true effect; and as it is admitted that the proprietary has never been consulted, we contend that that contract has never been confirmed pursuant to its terms, and therefore that, until that has been done, all the directors could do under the 114th clause was to confirm it as it stands; that is, as a conditional agreement, subject to the approval of the proprietary; and that not having been obtained, the purchase deed is beyond their power of confirmation. In other words, the utmost power the directors can claim under the 114th clause, is to ratify the act of the provisional directors under the contract; to say that contract shall stand. Then what is that contract? Why, a contract conditional on its being ratified by the proprietary (for the Court will, we contend, cast aside the words, "a board," as insensible), and it remains therefore then for the proprietary to say whether that conditional contract shall be an absolute contract; so that if the deed in question was not in itself beyond the powers of the directors, it was contrary to the contract with the Defendant *Clack*, and on that ground must be set aside.

The reasonableness of the compensation cannot be looked at on a question of construction, at least when the reasonableness is not expressly made a term by the

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instrument itself. If it were otherwise, upon every execution of the power the Court might be called upon to determine what was reasonable, and the effect would be that it would be a power not in the directors, but in the Court, whereas the contention is, that it is a power in the directors ; and as to any duty on the part of the proprietary, that is a moral question for them, not for this Court, to determine.

Mr. *Baily* and Mr. *Wickens* were not called upon for the Defendants.

The VICE-CHANCELLOR.


This bill is filed by a single shareholder in this bank, and therefore I think it may be concluded that he alone is of opinion that relief should be granted. Still if this instrument is sought to be set aside, either on grounds of fraud, or want of equity, one shareholder has a right alone to sue.

On the merits the matter stands thus : the Plaintiff insists that this deed, executed in May, 1857, is void as against every shareholder, on this ground ; firstly, that there is no power in the directors to make any such deed (a).

Now, on this point, it is contended, and correctly, in respect to deeds of settlement of joint stock companies, where the management is placed in the hands of a board of directors, that the governing body have no right to do acts out of the course of their common business,

(a) The other ground on which the Plaintiff relied, as already stated, depended entirely on special facts, and neither the arguments nor the judgment on that point are therefore reported.

except so far as they are authorized by the deed; and it is contended that the deed of settlement in this case gives no power to the body of directors to execute such a deed as that which is in contest.

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[His Honor then commented on the several sections, and particularly on the 56th section, which he held to be applicable only to superannuation, and he was of opinion that the case before him was not one of superannuation. His Honor then referred to the Defendant *Clack's* previous position, and to the terms and substance of the contract between him and the directors, and continued.]

Was this contract then authorized by any other clause of the deed? It was an arrangement for remunerating the services of the manager.—[His Honor then referred to the 54th clause and the 114th, and continued :]—The 54th authorizes a reasonable remuneration to the servants of the company; and the 114th intends to refer to acts done before the formation of the company. Is then the contract entered into by the directors on the 11th February, 1856, an act done by the directors relating to the formation of the company, and within the powers of the directors subsequently to ratify? I am of opinion that it was, and that upon those two sections, the act done by the directors on the 5th May, 1857, was within the powers of the directors, and that the deed is valid.

[His Honor being of opinion that the Plaintiff failed on the other part of the case, as well as on the purely legal question, dismissed the bill with costs.]

1858:  
July 31.

*Will.*  
*Construction.*  
*Substitution.*

PARSONS v. COKE.

Gift "to survivors of a class AND the issue of such survivor, such issue to take the parents' SHARE only," is a gift to the parents for life with remainder to their children, and not a *substitutionary* gift.

THE testator in this cause had given legacies to a nephew and two nieces for their respective lives, with remainder to their respective children, to be paid to them as to sons at twenty-one, and as to daughters at twenty-one, or marriage. "But in case either of them, the nephew and nieces, should die without issue, *then the legacy of him or her so dying to go to and be equally divided between the survivors of them AND the issue of such survivor; such issue to take the parents' share only*, and to be paid at the age of twenty-one years."

The nephew and two nieces survived the testator, and then the nephew died a bachelor, leaving him surviving the two nieces, one of whom had issue, and the other was recently married and had put her interests in settlement, but had no issue.

Mr. *Shapter*, Q.C., and Mr. *Bagshawe*, Jun., for the children of the former niece.

The two nieces are not entitled to the capital of the nephew's legacy. They are entitled for life only, with remainder as to the capital, to their children.

The words "survivors" and "survivor" must be construed according to their ordinary grammatical import, and not as "others" and "other," for there is nothing in the will to show any necessity for deviating from the former construction. (See the cases cited in *Jarman on Wills* (a), *Stead v. Platt* (b), and *Westwood v. Southey* (c).)

(a) Vol 2, p. 578 *et seq.*  
(b) 18 Beav. 50.

(c) 2 Sim. N. S. 192.

The word "issue" connected with the word "parent" means "children:" See *Jarman on Wills* (a).

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It will be said that the direction, that the issue shall take the parents' *share*, indicates that the issue or children were to take by way of substitution only in case of their parents being dead when the legacy accrued, and for that purpose it will be sought to adhere to the strict meaning of the word "*issue*," and to change the words "survivors" and "survivor" into "others" and "other," and to change the word "and" into "or," and thus to read the gift as if it were to the "*others or other of them, or the issue of such others or other.*"

But it is already shown that the word "issue" means "children," and that the words "survivors" and "survivor" do not mean "others" and "other;" and the Court will not now read "and" as meaning "or:" *Grey v. Pearson* (b).

The general scheme of the will shows that there was to be uniformity in settling the accrued shares in the same manner as the original legacies.

Mr. *Greene*, Q.C., Mr. *C. Hall*, and Mr. *Martindale* for the nieces and their husbands, and the trustees of the settlement made by one of the nieces.

The direction to pay the accrued shares to issue at twenty-one, whilst the original legacies were given to sons at twenty-one, and daughters at twenty-one or

(a) Vol. 2, p. 83 (2nd ed.). (b) 2 House of Lords Cases, 61.



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marriage, shows that there was not uniformity of scheme of settlement in the testator's mind.

How could the accrued shares be paid to issue at twenty-one, if they were to wait till the parent's death and take in remainder? This shows that the issue were to take only by way of *substitution*.

The words *parents' shares* are decisive on that question: see *Jarman on Wills* (a), and the cases there cited, especially *Hedges v. Harpur* (b).

Therefore the words "survivors" and "survivor" must be construed "others" and "other," and the word "and" must be construed "or."

We submit that as the two nieces survived the nephew they become entitled to the corpus of the nephew's legacy.

The VICE-CHANCELLOR:

The words "survivors" and "survivor" must be taken in their natural grammatical sense, unless there is something in the context to show that something else is meant by them; and there is no such context in this will.

The issue were intended to take something. They are not to take with their parents, but to take their share; and, in my opinion, after them or in *succession* and by way of remainder.

It is proposed to construe the words "survivors" and "survivor" as meaning "others" and "other."


(a) Vol. 2, p. 487 (2nd ed.). (b) 9 Beav. 479.

This cannot be done; but if the words were "others" and "other," my opinion would be the same, for I could not hold that the children took by way of *substitution* merely, without doing the violence of changing *and* into *or*, which I cannot do.

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The words "parents' *shares*" does not import that the corpus was in any case to belong to the parent, but is not inaptly used with reference to a fund to which the parent was to be entitled for life.

The legacy given to the nephew must be carried in moieties to the separate accounts of the nieces and their children.

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*Vestry.*  
*Charity.*  
*Acts of Parlia-*  
*ment.*  
*Construction.*

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**T**HIS was a summons adjourned from chambers, and the question was whether, upon the settlement in chambers of a charity scheme, having relation to certain almshouses, the Petitioners, in whom under the deed creating the charity the right of electing the almspeople was vested, or the existing parish vestry constituted under the 18 & 19 Vict. c. 120, were the proper parties to be represented.

A vestry meeting, in which a portion of the parishioners is excluded, is a "meeting in the nature of an open vestry meeting" within the 19 & 20 Vict. c. 112, sect. 3. But the election of persons to derive benefit under a charity creating almshouses, is not a "duty, power, or privilege" within the meaning of that clause of the Act."

By virtue of a deed dated in the year 1650, the almshouses were dedicated to charity, and by the same document it was declared that the almspeople should be chosen by the minister, churchwardens, overseers of the poor and such parishioners of the said parish (of

meaning of that clause of the Act."

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*St. George's, Southwark*) "as shall pay taxations to the poor, and shall not keep inmates or poor lodgers." A scheme for the future management of the charity was in course of settlement in chambers, and upon that settlement it became necessary to have before the Judge the persons in whom the right of electing the almspeople was held vested. This gave rise to the question stated above.

Mr. *Glasse* for the existing vestry constituted under the 18 & 19 Vict. c. 120.

The 2nd section of the 18 & 19 Vict. c. 120, directs how in future the vestry of certain parishes, of which *St. George's, Southwark*, is one, is to be constituted. Sec. 90 of the same Act transferred the duties, powers, and authorities relating to the regulation, government or concerns of a parish, which were then vested in commissioners, or anybody other than the vestry of such parish, to the new vestry; but it excepted from that transfer "such duties, powers and authorities as relate to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor." Then came the 19 & 20 Vict. c. 112 (the Act to amend the 18 & 19 Vict. c. 120), the first section of which declared that where at the time of passing the former Act the power of making church rates in any parish was vested in any open vestry, "or any meeting in the nature of an open vestry meeting," such power should not pass to the vestry constituted under the prior act. The 3rd section then enacted that "save as hereinbefore otherwise provided, all the duties, powers and privileges (including such as relate to the affairs of the church, or

the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor) which might have been performed or exercised by any open or elected or other vestry, or any such meeting as aforesaid (i. e. any meeting in the nature of an open vestry meeting) in any parish, under any local Act or otherwise, at the time of the passing of the said Act of the last session, shall be deemed to have become transferred to and vested in the vestry constituted by such last-mentioned Act." The right of electing the alms-people is a duty, power or privilege within that 3rd section; it relates to the relief of the poor, and it is exercised by a body "in the nature of an open vestry." It therefore passes, according to the terms of the section, to the vestry (a).


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Mr. *Speed* for the "ministers, churchwardens, overseers of the poor, and such parishioners of the said parish as shall pay taxations to the poor, and shall not keep inmates or poor lodgers."

First. This body is not a meeting in the nature of an open vestry meeting. An open vestry is composed of "every person who pays church rates, scot and lot, and also the vicar and churchwardens:" *Lord Raym.* (b) In a parish like *St. George's*, taking from that body every person who kept inmates and poor lodgers, essentially altered its constitution.

Secondly. There is a proviso at the end of the 19 & 20 Vict. c. 120, s. 3, expressly excepting from this clause such a charity as that in question, for it provides

(a) *Carter v. Cropley*, 26 L. J., N. S., Ch. 246, was cited and distinguished from the present case. (b) Vol. 2, p. 1388.

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that all duties and powers relating to the management or relief of the poor, which at the time of the passing of the former Act "were vested in or might be exercised by any guardians, governors, trustees or commissioners, or any body other than any open or elected or other vestry, or any such meeting as hereinbefore mentioned, shall continue vested in and be exercised by such guardians, governors, trustees or commissioners or other body as aforesaid." This is ambiguous, and its sense depends upon whether the words "were vested in" are to be connected with the words "any such meeting as hereinbefore mentioned," or whether the words "other than" are to be read as immediately preceding "any such meeting as hereinbefore mentioned." The former construction is the true one, and under it this right of election is prevented from passing to the new vestry.

Thirdly. This right is not a duty, power or privilege within the meaning of either of the Acts above cited, and therefore does not pass under them. The judgment of *Turner, L. J.*, in *Carter v. Cropley*, is expressly in point upon this part of the case.

Mr. *Baily* for the Drapers' Company.

Mr. *Hinde Palmer* for the Relator.


Mr. *Glasse* in reply.

The VICE-CHANCELLOR :

The first question is, whether the meeting specified in the deed creating this charity is within the 19 & 20 Vict. c. 112, sect. 3, "a meeting in the nature of an open vestry meeting."

Now an open vestry meeting is something contra-

distinguished from a select vestry meeting. An open vestry consists of the ministers and churchwardens, the officers who are necessarily and *ex officio* members, and all parishioners paying scot and lot. That is the definition of an open vestry. Certain Acts of Parliament have by their provisions prohibited from voting a member of a vestry who has not paid certain rates; but those statutes merely restrict the right of voting; they do not take away the right as member. A meeting then "in the nature of an open vestry meeting" must be a meeting having some of the characteristics of an open vestry, but having some of those characteristics omitted or curtailed. The exclusion therefore of some limited portion of the parishioners from a meeting which otherwise would be an open vestry meeting will bring it within the description of a meeting *in the nature of* an open vestry meeting. I am of opinion, therefore, that the meeting mentioned in the deed creating the charity would be a meeting in the nature of an open vestry meeting.

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Then comes the question as to the construction of the 3rd section of the 19 & 20 Vict. c. 112.

That section enacts that all the duties, powers and privileges (including such as relate to the affairs of the church or the management and relief of the poor, or the administration of any money or other property applicable to the relief of the poor) which might have been performed by any open or elected or other vestry, or any meeting in the nature of an open vestry, shall be transferred to and vested in the newly constituted vestry; and it contains a provision which runs thus: "Provided that all duties and powers relating to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property

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applicable to the relief of the poor, which at the time of the passing of the said Act (18 & 19 Vict. c. 120) were vested in or might be exercised by any guardians, governors, trustees, or commissioners, or any body other than any open or elected or other vestry, or any such meeting as hereinbefore mentioned, shall continue vested in and be exercised by such guardians, governors, trustees, or commissioners, or other body as aforesaid." Now it is argued that under this proviso the duties and powers reserved in the charity deed in this case were expressly continued in "the meeting in the nature of an open vestry." No doubt the framing of the section is by no means clear. Two readings may be put upon it. One—putting in the words to be understood—would render it thus: "All duties, &c., which at the time of the passing of the said Act were vested in any guardians, &c., or" were vested in "any body other than any open or elected or other vestry, or" were vested in "any such meeting" (*i. e.*, a meeting in the nature of an open vestry meeting) "shall continue vested," and so forth. The other reading would run thus: "All duties, &c., which at the time of passing of the said Act were vested in any guardians, &c., or" were vested in "any body other than any open, elected, or other vestry, or" other than "any such meeting," shall continue, and so forth. It is obvious that the latter of these readings is in sense precisely the reverse of the former. The question, therefore, is, which is the correct reading, and it appears to me that the latter expresses the true meaning of the legislature, and for this reason: if it were read otherwise there would be a contradiction between the proviso and the former part of the section; for while the former part transfers duties which might have been exercised by any meeting in the nature of an open vestry to the new vestry, the latter portion would seem to have

provided for the retainer of such duties by the meeting. It appears therefore to me, that if the right of selecting these almspeople were a duty, power or privilege within the 3rd section of the Act of 1856, it would pass to the new vestry constituted by the prior Act. The point therefore is now narrowed to the question, whether this right of election is a duty, power or privilege within this section. In reference to this final question I must be guided by the decision of the Lords Justices in *Carter v. Crompton*, which has been cited in argument. Now following the line of decision laid down by Lord Justice Turner in that case, and bearing in mind the scope of the first Metropolitan Management Act, the conclusion is inevitable that this right of election was not such a power, privilege or duty. It has been said that it came within the words of the Acts referred to; "management or relief of the poor." In one sense, no doubt, this deed was a provision for the relief of the poor, but the sense in which that word is used in these Acts has manifestly reference to the general parochial relief of the poor, and does not apply to a merely charitable relief. Neither is this the case of "administration of money or property applicable to the relief of the poor." There is no administration of property, but a mere right of election, and even that right of election has not, as already stated, relation to that species of relief for the poor which was in the contemplation of the legislature in these Acts. Upon the whole, therefore, I conclude that the persons forming the assembly mentioned in the deed, and not the new vestry, ought to be represented before the chief clerk.

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Demurrer.  
Review, bill of.  
Pleading.

## HENDERSON v. COOK.

A bill of review must state on the face of it that it is filed with the leave of the Court; if it does not it is demurrable. A general demurrer does not include, as a demurrer on the record, the ground of the bill (being a bill of review) not stating on the face of it that it is by leave of the Court; but that ground may be taken *ore tenus*.

A bill, purporting to be an original bill, sought to review a prior decree in a suit between the same parties, on the ground of the decree having been obtained by fraud; the fraud alleged was that the Defendants had in their answer concealed certain facts from the Plaintiffs and the Court; but it appeared that those facts might have been elicited by exceptions. Held, that was not such fraud as to justify an original bill, without leave of the Court, to review a decree.

THIS cause came on upon demurrer. The bill was filed by the representatives of *Patrick Henderson*, against *John Cook* and *Maria Cook*, and against one *Edwin Martin Atkins*. The bill set out the codicil to the will of *Francis Honeywood* (who died in 1764), by which he bequeathed a legacy of 20,000*l.* upon certain trusts to be distributed at the discretion of his trustees, for the benefit of his relations by blood, not worth more than a specified amount of property.

The allegations of the bill were voluminous and minute, but as the arguments and the judgment turned on principle, and not on the minute language of the bill, it will be sufficient to state the substance.

The bill alleged that the trust fund came first into the hands of the original trustees, and that a large part of it was by them applied in payment to the objects of the testator's bounty, under a decree in a suit for administering the testator's estate; but that a certain portion, 2,500*l.* Stock, was not so applied. It stated with sufficient precision that the fund had been set apart and earmarked, and it stated sufficiently the title of *P. Henderson* to participate in the fund; that *Margaret Henderson*, formerly the representative of *P. Henderson*, had received under the decree above mentioned a sum

of 25*l.*, but that such sum was not the whole of *P. Henderson's* share, but only a donation by way of temporary assistance given under the direction of the Court; and it stated that since that payment (which was very many years before the institution of this suit) no other persons had claimed to be recipients, and that the Plaintiffs, as *P. Henderson's* representatives, were the only persons entitled to the 2,500*l.* Stock remaining unapplied, and its accumulations extending over a very lengthened period.

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It traced the 2,500*l.* Stock through the hands of *Abraham Atkins*, the surviving trustee of the testator, into the hands of *Atkin Atkins*, the representative of *Abraham Atkins*, and thence into the hands of the Defendant *John Cook*, and *Joseph G. Cook* deceased, (whose representatives were the Defendants, the two *Cooks*), and it alleged notice in all those several persons of the fund being a trust fund, and of the claim of the Plaintiffs thereto; and it specifically alleged that *Atkin Atkins* had received and applied dividends to his own use; it then stated that the *Cooks* had, previously to 1851, applied all the personal estate of *Abraham Atkins* and *Atkin Atkins*, and also the 2,500*l.* as his estate, in the administration thereof, and without providing for the Plaintiffs' claim. It stated that considerable real estates, partly the estate of *Abraham Atkins*, and partly the estate of *Atkin Atkins*, had come into the possession of the Defendant *J. Cook*, and of the deceased *J. G. Cook*, upon trust for divers persons as devisees thereof, and among others for the Defendant *Edwin Martin Atkins*; that such real estate was charged with the trust legacy, and the Defendants had notice thereof. It then stated that in 1851 the Plaintiffs had filed this bill against *J. Cook* and *J. G. Cook*, alleging all the matters alleged in this bill and seeking to charge them

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with the 2,500*l.* and interest personally; that they put in their answer, and stated that they had parted with the assets of *Atkin Atkins*, including the 2,500*l.*, without notice that it was trust money; and alleging that they had found it mixed with his own monies; but concealing from the Court that they had other estate of *Atkin Atkins* in their possession; the bill alleged that they allowed the cause to be heard concealing that fact from the Court, and that at the time the cause was heard they had a deed ready prepared, of which they did not inform the Court, for dividing the remaining estate of *Atkin Atkins* between his devisees, and that they did, immediately after the decree, so divide it. It then alleged that the Court, thus deluded, had dismissed the bill against the *Cooks*, and it alleged that under the circumstances the decree was obtained by fraud and ought to be set aside; and it prayed that the decree might be accordingly set aside; and it prayed for the necessary accounts and for general relief. The bill did not allege that the leave of the Court had been obtained; nor, in fact, had the leave of the Court been obtained.

To this bill the Defendant *Atkins* put in a general demurrer for want of equity.

The Defendants, the *Cooks*, also demurred generally for want of equity and also for want of parties; and they demurred also on the record, because the Plaintiffs had not obtained the leave of the Court to file the bill; stating that as a fact on the face of the demurrer.

Mr. *Shapter* and Mr. *Wickens* for the Defendant *Atkins*.

I. This is a bill of review, and it is filed without leave; at least, the bill does not allege that it is filed

with leave; and the bill is on that ground demurrable. This is a general demurrer, and upon a general demurrer this ground of objection may be assigned as a reason; but if it cannot be so assigned as part of the demurrer on the record, it clearly may be *ore tenus*: *Bainbrigge v. Baddeley* (a).

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II. The proper parties are not before the Court; only one claimant out of the whole class is before the Court, and though there is an allegation that no persons but the Plaintiffs are entitled, that is an allegation of law; it is not alleged that all the claimants are dead without representatives, nor is it otherwise alleged that there are no claimants.

III. The other appointees under the deed dividing the estate of *Atkin Atkins* are not parties; this is not a joint and several, but a joint liability; and the Plaintiff has no right to select one of the parties alone.

IV. The bill prays a sale of the estate of the Defendant *Atkins*; that estate is subject to charges, and the Plaintiffs seek a relief which would sweep away or interfere with those charges.

V. It is alleged that the trust fund got into the hands of the *Cooks*, and that they misapplied it; it is not alleged that *Atkin Atkins* misapplied it. Then what has the Defendant *Atkins*, who claims under *Atkin Atkins*, to do with the breach of trust committed by his representatives? How does that affect the estate of *Atkin Atkins*?

VI. The Plaintiffs do not show that they have a right to a shilling more than they have had. It is in the dis-  
 (a) 9 Beav. 538; Lord Redes. p. 93.

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cretion of the trustees to give them what share they liked, and there is nothing to show that the trustees have not exercised that discretion in giving *P. Henderson's* representative 25l.

VII. The great lapse of time, to which the allegations of the bill afford no answer, will bar the Plaintiffs; and we rely on the statute in support of the demurrer.

Mr. *Glasse* and Mr. *Drewry* for the bill.

If this were a bill of review, the first objection cannot hold. It is not necessary that a bill of review should allege that leave has been obtained; there is no authority for that proposition; the case that Lord *Redesdale* refers to in p. 93, does not contain one word on the subject, and Lord *Redesdale* does not express himself positively.

Then if it is not necessary to put the allegation in the bill, this demurrer is necessarily a speaking demurrer; for it alleges a material fact not appearing on the bill, and is therefore bad.


II. The bill is not a bill of review, but an original bill to set aside a decree obtained by fraud. The Defendants to the former suit concealed from the Court facts, in the absence of which the Court founded its judgment; they concealed them both in their answers and at the hearing.

Such a bill may be filed without leave: *Lloyd v. Mansell* (a).

The cases cited on the other side are cases where there was no fraud.

(a) 2 P. Wms. 74.

III. As to parties: The bill alleges that no one is entitled except the Plaintiffs; that excludes the necessity of any other of the claimants under *Honeywood Frazer's* will. As to the other appointees of the deed of division, we have a several right against each, and may claim the fund against either separately; besides, in this bill there is nothing to charge the others with liability.

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IV. The bill does not seek to disturb the charges on *Atkin's* estate. It prays a sale of *his* estate, that is, subject to the charges.

V. It is alleged that *Atkin Atkins* received and misapplied dividends. That is enough to make his estate liable; and the Defendants took with notice of the charge on *Atkin Atkins's* estate; that makes it a charge on the Defendant's estate, whether he is under the deed either a legatee, or otherwise a volunteer, or a purchaser for valuable consideration. But the deed itself shows he was a volunteer.

VI. The discretion of the trustees is gone; the allegation is that there are no persons entitled except the Plaintiffs; it cannot be pretended that the trustees are to keep the fund for themselves. If, then, there is but one *cestui que trust* in existence, they hold it for him.

Lastly. The bill charges participation in the fraud against *Atkins*, and prays costs, and he may be liable for costs, even though no other relief could be had against him.

[The demurrer of the *Cooks* was argued precisely on the same grounds; and further, it was insisted for the Plaintiffs, that whether they had applied the fund to

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their own use, or as part of the estate of *Atkin Atkins*, in either case they were liable. It was also contended that the second branch of the demurrer was bad in form as a speaking demurrer; and counsel for those Defendants then tendered it as a demurrer *ore tenus*.]

The VICE-CHANCELLOR :

First, as to the demurrer of *E. M. Atkins*, which is a general demurrer, and as to the other demurrer so far as it is a general demurrer, I think that if the case were divested of the collateral grounds of demurrer taken *ore tenus*, and looking at the facts alleged by the bill, there would be sufficient to sustain the bill. There is a sufficient allegation of this, that *Atkin Atkins* did receive dividends of the trust fund and apply them to his own use. And if that be so, he was liable at least for something, and therefore there would be an equitable case both as against the *Cooks*, and as against the party who is beneficially interested in *Atkin Atkins'* estate, to make that good.

But then this bill, which is against the *Cooks* and another party, expressly prays that a former decree made in a suit by the same parties against the *Cooks*, seeking the same relief as against the *Cooks*, may be reversed or varied. Now that is the prayer of a bill of review; for though the word review is not used, that makes no difference. *Primâ facie* then it is a bill of review. But then it is argued that it is not a bill of review, but an original bill; and it is said that such a bill may be filed to set aside the former decree, treating it as of no value, by reason that it was obtained by fraud; and decision to that effect is cited. If that is so, it may create difficulty in determining when a bill

is a bill of review and when it is an original bill. However, the decisions seem to have that effect; but I do not think them applicable in this case. In one, *Lloyd v. Mansell*, the decree was signed and enrolled, and it had been obtained by gross fraud. But what is here the allegation for setting the decree aside? It is said that by the bill filed in 1851 it was sought to make the estate of *Atkin Atkins* liable [His Honor read portions of the prayer of the former bill set out in this bill.] Now so far as this, that bill does seek to make the estate of *Abraham Atkins* and *Atkin Atkins* liable; and that bill having charged that the *Cooks* ought to admit assets or give an account, it is now argued that the Defendants the *Cooks* were guilty of fraud in not saying by their answer, "we have assets." But it does not appear whether they were interrogated upon that point, and if they were and did not answer, that would amount to no more than insufficiency, so that it would amount to this, —that an insufficient answer is fraud. Then it is alleged that the Court proceeded wholly or partly on the assumption grounded on that silence in the answer. Now to call that fraud would be to apply a term wholly inapplicable; if the Plaintiffs wished for a full answer, they should have taken exceptions: the Plaintiffs in this case should have shown, that the matters referred to were purposely suppressed; that facts were purposely concealed which the Defendants were bound in conscience to disclose. It appears to me, that, assuming there may be cases in which where a party has been misled by gross fraud, he may file an original bill, that principle does not apply to the facts alleged in this case, and that this is a bill of review.

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What, then, is the rule of this Court? If the ground of the bill is that subsequently to the decree, the Plain-



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tiff has discovered facts inconsistent with the decree, he asks the leave of the Court, and the Court will require to know that the Plaintiff did not know the facts earlier. That being the rule, it becomes necessary, before you can file a bill of review, to have the leave of the Court. Is it then necessary that the fact of leave being granted should be stated by the Plaintiff? If the matter were *res integra*, I confess I should not easily arrive at the conclusion that it is necessary. If, in fact, leave has not been obtained, the Defendant can apply to take the bill off the file; but I find that we have the opinion of Lord *Redesdale*, although he only expresses it as an opinion, that it seems necessary; and he refers to a case in *Vernon*, which, however, does not at all touch the point; but he refers also to an ancient book of forms, and there I find a precedent of a demurrer framed on that footing; then I find that in *Bainbrigg v. Baddeley* (a), one of the grounds of the demurrer was expressly that the bill did not contain the allegation, and Lord *Langdale* allowed the demurrer on that ground. On these authorities I am bound to hold that it is necessary in a bill of review to state the leave on the face of it.

Then a subordinate question is this: we have here a general demurrer for want of equity—does that include in the demurrer on the record, a demurrer because the bill does not allege that leave has been obtained? Now a demurrer for want of equity is a demurrer on the merits; this is a very different ground of demurrer, and I cannot regard a general demurrer, as including on the record, this particular ground of demurrer. But it is a valid ground of demurrer *ore tenus*, and as such must be allowed.

(a) The report of the case does not show this satisfactorily; but the record was produced in Court, and does show it.—  
[REF.]

[His Honor had already, in the course of the argument, decided that the demurrer, for want of allegation of leave in the demurrer of the *Cooks*, was a *speaking demurrer*, as stating a substantive and material fact not appearing on the bill. He therefore held both the demurrers on the record bad; but sustained the demurrers *ore tenus*, and made the usual order, allowing both the demurrers, but without costs.]

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HENDERSON  
v.  
COOK.

MORISON v. MORISON.

**THIS** case came on upon the demurrer of *James Morison*, one of the Defendants.

1858:  
10 Nov.  
Pleading.  
Demurrer.

The bill made the following case:—*William Morison* by his will, dated the 10th July, 1829, gave the residue of his estate to his wife for life; and after other devises and bequests the said testator gave and devised unto his son the Defendant, *William Morison* (thereinafter called the younger), after the decease of his said wife, one equal fourth part or share, the whole into four equal parts to be considered as divided, of and in all that freehold messuage or tenement known by the sign of the *Admiral Duncan*, on the north side of the road leading from *Deptsford Broadway* to *New Cross* in *Deptsford* aforesaid, and in the yard, garden, stabling and appurtenances thereunto belonging, to hold the same unto his said son the Defendant, *William Morison* the younger, his heirs and assigns for ever. And the said testator, *William Morison* the elder, also gave and devised unto his son the Plaintiff, *John Morison*, after the decease of his said wife, the remaining three fourth parts or shares of or in the said freehold messuage or tenement or vitualling house called the *Admiral Duncan*, and of and in the yard, garden, stabling and ap-

A bill, setting up a case that an absolute conveyance of an equity of redemption was made to the Defendants on the faith of a verbal promise to reconvey on being paid the price, alleged that the effect of the agreement was so, but did not set out the terms of the agreement *totidem verbis* as a fact. Held, that there was a sufficient allegation of a promise, and that the Court could not say on demurrer that there could be no relief.

1858.

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v.  
MORISON.

purtenances thereunto belonging, to hold the same unto his son, the Plaintiff *John Morison*, his heirs and assigns for ever. And he also gave and devised unto his said sons, the Defendants *William Morison*, *Alexander Morison* and *James Morison*, and unto his son-in-law, the Defendant *David Reid*, after the decease of his said wife, all those his five freehold messuages or tenements situate and being on the west side of *High Street* otherwise *Butt Lane* in *Deptford* aforesaid, in the several occupations therein mentioned, to hold the same with the appurtenances thereunto belonging to the said Defendants *William*, *Alexander* and *James Morison*, and *David Reid*, their heirs and assigns, upon trust to sell and dispose of the same when and so soon as the youngest of his said children, that is to say, his children in the said will and thereafter mentioned, should have attained the age of twenty-one years, or as soon after as they the Defendants, his said three sons, and the Defendant his said son-in-law, should deem expedient, either by public auction or private contract, for the best price that could be obtained for the same. And the said testator gave and bequeathed the money arising by such sale of the said five freehold houses, after deducting all expenses attending such sale, unto and amongst his said sons and daughters, that is to say, the said children in the said will and thereafter mentioned, in equal shares. And the said testator gave all the rest, residue and remainder of his property, of what nature and kind the same might be or consist of at the time of his decease, from and immediately after the decease of his said wife, unto his said sons and daughters thereafter mentioned in equal shares between them. And the said testator appointed his said wife, the said *Isabella Morison*, widow, and the Defendants *William Morison*, *Alexander Morison* and *James Morison*, and

the said *David Reid*, executrix and executors of his said will.

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v.

MORISON.

The bill then went on to show the title of the Plaintiff as one of the testator's children to certain property under the will, and also to certain other property under the will of one *Bickerton*, and that he had mortgaged it, and then proceeded thus:—

“25. In the year 1840, the Plaintiff at that time being in business as a warehouseman in the city of *London*, became involved in pecuniary embarrassments, and a negotiation was carried on between the Plaintiff and all his creditors with a view to relieve the Plaintiff from his said embarrassments, and the Plaintiff proposed and agreed to assign to the said creditors the whole of the property, save as hereinafter mentioned, he was then possessed of. And the said creditors accepted the proposal and agreed to the same, and in consideration thereof agreed to release the Plaintiff from the whole of his liabilities to them; but the Plaintiff did not include in such proposal and agreement as aforesaid his equity of redemption in the respective properties by him so mortgaged by the said several indentures of the 25th day of July, 1837, and the                      day of                      , 1839, as aforesaid, neither did the said creditors intend or propose or agree that the same or any part thereof should be included in such proposal and agreement, as well on account of their personal friendship for the Plaintiff as for the reasons among others in the thirteenth paragraph of this bill mentioned.

“26. In pursuance of such proposal and agreement as aforesaid, the Plaintiff, by an indenture dated on or about the                      day of                      , 1840, but

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~  
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v.  
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prior to the date and execution of the indenture in the thirty-second paragraph of this bill mentioned, assigned to the said creditors the whole of his said property, except as in the twenty-seventh paragraph of this bill and otherwise appears; but no release was then executed by the said creditors to the Plaintiff of his liabilities to them, and ultimately the said creditors refused to execute such release until such time and under the circumstances as are hereinafter mentioned.

“27. The said creditors of the Plaintiff were his personal friends, and out of friendship for him agreed to and in fact did except out of the said assignment to them as well the said equity of redemption as also of the then unexpired term of his lease of the premises in which he had carried on his said business, together with the furniture and fixtures upon the said premises.

“28. During the said negotiation, and before the said assignment to the said creditors, the Defendants *William* and *James Morison* discovered that such negotiation as aforesaid was going on, and upon such discovery they entered into communication with certain of the said creditors who had been appointed to wind up the Plaintiff's business in trust for the benefit of the whole of the creditors, and the Defendants *William* and *James Morison* offered to the said creditors so appointed as aforesaid the sum of 100*l.* if they would procure, induce and prevail upon the Plaintiff to convey to them, the said *William* and *James Morison*, the Plaintiff's equity of redemption in the said then reversionary and other interests by the said several indentures of the 25th day of July, 1837, and the day of \_\_\_\_\_, 1839, so mortgaged to the Defendant *James Morison* as aforesaid.

"28. The said creditors thereupon, at the instance and pressing request of the Defendants *William* and *James Morison*, urged the Plaintiff to convey his said equity of redemption in the said interests in the said several indentures of the 25th day of July, 1837, and the                      day of                      , 1839, mentioned and conveyed as aforesaid to the said Defendants *William* and *James Morison*, and threatened that unless he did so they would proceed to make a bankrupt of him instead of releasing him from his liabilities to them upon such assignment as hereinbefore mentioned. The Plaintiff, after resisting the said proposal to convey his said interests in the equities of redemption to the said *William* and *James Morison*, consented, but not until after the promise and agreement hereinafter mentioned with the Defendants *William* and *James Morison*, and under pressure of the threats aforesaid, to convey the same to the Defendants *William* and *James Morison*. The promise and agreement lastly hereinbefore mentioned, as to the Plaintiff and the Defendant *James Morison*, was made between the Defendant *James Morison* and the Plaintiff, and was to the effect that he the Defendant *James Morison* would, after such conveyance to them the Defendants *William* and *James Morison* of the said equity of redemption, hold his share of the interest of the Plaintiff so conveyed, that is to say, one-half share of the said interest, upon trust for the benefit of the Plaintiff, and to reconvey the same to him, upon the Plaintiff paying to the Defendant *James Morison* his moiety, or half of the sum of 100*l.*, the sum proposed as aforesaid by the Defendants *William* and *James Morison* to be given to the creditors for the conveyance of the said equities of redemption from the Plaintiff, together with the moiety or half of the said sum of 1,000*l.* and interest due

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 v.  
**MORISON.**

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thereon; and the Defendant *William Morison* knew at the time thereof of the fact and nature of the last-mentioned agreement; and the Defendant *William Morison* also at the same time held out the promise and expectation to the Plaintiff, that if the Plaintiff would accept this offer of the Defendant *James Morison*, that he, the Defendant *William Morison*, might be induced at some future period to give up his share of the interest of the Plaintiff so conveyed, that is to say, the other one-half share of the interest to the Plaintiff, and convey the same to the Plaintiff upon similar terms to those hereinbefore mentioned as to the Defendant *James Morison's* share; and the Defendant *James Morison* knew at the time thereof of the fact and nature of the last-mentioned agreement and promise. The Plaintiff refused to and would not make or execute such conveyance of the said equities of redemption until the said *James* and *William Morison* had made such promises and agreements respectively as aforesaid.

"30. It was not until such offer of the said Defendants *William* and *James Morison* to pay them the said creditors so appointed as aforesaid the said sum of 100*l.* that they, the said creditors, urged and threatened the Plaintiff in manner aforesaid, and, in fact, the said creditors knowing, at the time of the said agreement to assign to them by the Plaintiff, and to release to the Plaintiff by them aforesaid, of the fact of the Plaintiff being entitled to the equity of redemption as aforesaid, and never intending, until the said offer of the said *William* and *James Morison*, to have enforced a conveyance of such equity of redemption to themselves, as they the said creditors considered it then worthless.

"31. The said sum of 100*l.* was advanced by the said

Defendants *William* and *James Morison* in equal moieties, and the equity of redemption as to one-half of the Plaintiff's said interest in the property in the said several indentures of the 25th day of July, 1837, and the                      day of                      1839, aforesaid was conveyed as hereinafter mentioned as to the said Defendant *William Morison's* share; and the Defendant *William Morison* agreed with the Defendant *James Morison* to pay off the said moiety or 500*l.* to the said *James Morison*, and the other moiety of the said equity of redemption was conveyed by the said conveyance to the said Defendant *James Morison*, and was not merged in the legal estate of the said *James Morison* therein, and the same was kept alive by the said agreement in the twenty-ninth paragraph mentioned and otherwise as herein appears.

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"32. In consequence of the said threats and pressure of the said creditors, but not until after the aforesaid promise and agreement of the Defendants *William* and *James Morison*, the Plaintiff, by an indenture dated on or about the year 1840, and made between the Plaintiff of the first part, the Defendants *William* and *James Morison* of the second and third parts, and the Defendant *George Agutter* of the fourth part, at the request and by the direction of the Defendants *William* and *James Morison*, granted and conveyed his said equity of redemption in the said property in the said several indentures of the 25th day of July, 1837, and the day of                      1839, mentioned to the Defendant *George Agutter*, the brother of the wife of the said Defendant *William Morison* the younger, in trust as to one moiety thereof for *Catherine*, the wife of the said Defendant *William Morison* the younger, since deceased, and upon other trusts for other parties



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in the event of her death, which trusts and parties the Plaintiff does not know, and is unable to state or set forth or name with certainty or otherwise, the said indenture being in the possession or power of the said Defendants *William* and *James Morison* and *George Agutter*, who have, and do refuse, all access to, or information as to the contents of, or trusts in, and parties to and interested in the same; and as to the other moiety of the said equity of redemption for the Defendant *James Morison* absolutely. The said *George Agutter* at the date of the execution of the lastly-mentioned indenture of 1840 knew of the whole of the circumstances and facts in the twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, and thirty-first paragraphs in this bill mentioned.

“33. Before the said conveyance by the said indenture of 1840, in the thirty-second paragraph of this bill mentioned, was executed, the Plaintiff's mother, the said *Isabella Morison*, widow, and other members of the Plaintiff's family, offered, on behalf of the Plaintiff, to advance to the Defendants *William* and *James Morison* the said sum of 100*l.*, with a view to procure the said conveyance of the said equity of redemption to be made to the said Defendants *William* and *James Morison*, for the benefit of the Plaintiff, but the Defendants *William* and *James Morison* refused to accept the said offer. However, the Defendant *James Morison* then stated that he was then willing to hold, and should always hold, the share of the said equities of redemption which should be conveyed to him for the Plaintiff, and would reconvey the same to him upon payment by the Plaintiff of 50*l.*, the half of the said sum of 100*l.*, together with 500*l.*, the half of the principal and interest due to him. And immediately after the said conveyance

of 1840, in the thirty-second paragraph of this bill mentioned, was executed, the Defendant *James Morison* offered to the Plaintiff to reconvey to the Plaintiff his moiety or share in the said equities of redemption upon being repaid the said sum of 50*l.*, one half of the said sum of 100*l.*, and the said sum of 500*l.*, one half the said sum of 1,000*l.*, together with interest on the said sum of 500*l.* as aforesaid, but the Plaintiff refused to accept such offer from the Defendant *James Morison* alone, and insisted that the Defendant *William Morison* should also reconvey his interest or share of the said equities of redemption upon being repaid 50*l.*, his moiety of the said sum of 100*l.*, and insisted, and he still insists, that both of the Defendants were, and are, bound to reconvey, and that each was, and is, bound to reconvey to the Plaintiff the said equities of redemption, and to procure the reconveyance to the Plaintiff from the other of them his share of the same.

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*v.*  
**MORISON.**

“ 34. The Defendant *William Morison*, shortly after the date and execution of the said indenture of the day of 1840, in the thirty-second paragraph of this bill mentioned, offered to the Plaintiff to give up to him, and to reconvey to him, all his the Plaintiff's interest aforesaid under the said will of the said testator *David Bickerton*, and so mortgaged by him by the said indenture of the day of 1839, as aforesaid, if the Plaintiff would agree that the Defendant *William Morison* should retain to his own use the whole of the Plaintiff's interest aforesaid under the said testator, *William Morison* the elder's, said will, and in particular his interest in the said three fourth part or shares of the said public-house, the *Admiral Duncan*, that is to say, his the Plaintiff's equity to redeem the same; and the Defendant *William*

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v.  
MORISON.

*Morison* has made various other offers to the Plaintiff and other parties of a similar character and to the same effect to that above mentioned, but the Plaintiff refused, and always has refused, to accede or agree to such offer and proposal, or to any of such lastly-mentioned offers, and insisted, and has always insisted, that the Defendant *William Morison* was, and is, bound to reconvey to him the whole of his interest under both the said wills so conveyed to the Defendant *William Morison* as aforesaid, subject to no condition whatever, upon the Plaintiff repaying the Defendants *William* and *James Morison* the said sum of 100*l.* and the said sum of 1,000*l.*, with interest thereon, as aforesaid.

The bill prayed:—"1. That it may be declared that the Defendants *William* and *James Morison* and *George Agutter* are trustees, under the said indenture of 1840, in the thirty-second paragraph of this bill mentioned, for the Plaintiff of the interests or equities of redemption thereby so conveyed by him as aforesaid.

"7. That the Plaintiff may be permitted and declared entitled to redeem the said mortgaged premises, and that the Defendants, *William* and *James Morison* and *George Agutter*, and all other proper parties, may be decreed to reconvey to the Plaintiff the premises by the said indentures of the 25th day of July, 1837, and 1839, and of the year 1840, so mortgaged and conveyed as aforesaid.

"9. That the Defendants *William* and *James Morison* and *George Agutter* may be decreed to deliver up possession of the Plaintiff's said three fourths, part or share, of the said mortgaged premises, the *Admiral Duncan*, to the Plaintiff, or to such person as he shall

direct, free from all incumbrances; and to deliver over to the Plaintiff all deeds and writings in their or either of their custody or power relating to the said mortgaged premises.

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 MORISON  
 v.  
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"10. That the Plaintiff may have such further or other relief as the nature of the case may require."

Mr. *Baily* and Mr. *Shebbeare* for the demurrer.

I. This case is within the Statute of Frauds; the promise alleged related to land, and was not in writing; and there is no sufficient allegation of fraud to take it out of the statute. Paragraph thirty-two alleges an absolute conveyance, and no fraud is alleged in obtaining it.

II. The allegations of the promise are altogether vague. In paragraph twenty-eight, the allegation is not that there was an agreement in such and such terms; but that the *effect* of the agreement was such;—that is an allegation of an inference of law, not of a fact. It is for the Court to judge of the effect of an agreement; the bill should allege the *terms*, not the *effect* of the agreement.

III. There are two agreements or promises, inconsistent with each other. The agreement in paragraph twenty-eight is not consistent with the promise in paragraph thirty-three. Which is the agreement on which the Plaintiff relies? They cannot both stand, and the Court cannot say which was the agreement.

IV. The agreement or promise, if there was one, was without consideration. The Defendants bought out and

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out, and took an absolute conveyance, and then it is said, they promised to reconvey. That is not a contract that this Court will enforce.

The Plaintiff had the benefit of the sale ; it was in effect a sale to pay his creditors.

Mr. *Glasse* and Mr. *Joyce*, for the bill, were not called upon.

The VICE-CHANCELLOR, after referring to the allegations of the bill, held, that they amounted to a sufficiently positive and clear allegation that the Plaintiff was induced to give an absolute conveyance upon a promise to hold the property on trust for the Plaintiff; and that being so, the Court could not say there was no possibility of relief.

The demurrer was therefore overruled.

1858 :  
 July 17.  
  
 Words.  
 Construction.

#### COOKE v. CHOLMONDELEY.

A direction to keep buildings in *good repair*, means, not the state of repair in which they were at the testator's death, but in habitable repair :

THIS was an adjourned summons in the cause to determine the form in which instructions should be given to a surveyor with reference to repairs. The will in this case and the state of the family are set out (*ante*, p. 144).

The material passage in the will, on which the question now turned, was the trust "out of the rents but in habitable repair : " farming buildings" includes " farm houses."

and profits to keep the mansion-house and all other buildings and messuages in *good repair*, rebuilding, if necessary, any *farm buildings* that may from time to time require it." And the question was between the tenant for life and the remainderman; the former contending that the trust only authorized keeping the mansion-house and buildings in such repair as they were in at the testator's death, which it was admitted was a state of considerable dilapidation, and contending also that the trust did not extend to rebuilding *farm houses*. The remainderman contending that the trust extended to farm houses, and also to putting the mansion-house and buildings into a state of good and tenantable repair.

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Mr. *Jessell* for the tenant for life.

Mr. *Freeling* for the tenant in remainder.

[The VICE-CHANCELLOR referred to the part of the will set out above]:—

It is clear that the testator does not give his wife and daughters anything except subject to these matters. Until the things specified are done, nothing is given. Then I must give such directions as will give full effect to this intention, whether it is advantageous for the wife and daughters or not. But I must protect them against anything more than the testator meant. The testator was the owner of a mansion-house, admitted to be an old house and of considerable dimensions; he was also owner of considerable real estates, comprising farm houses and farm buildings, and he has directed them to be kept in good repair. It is clear

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COOKE

v.

CHOLMONDELEY.

the mansion-house, and other messuages, except farming buildings, are not to be rebuilt unless all parties consent; but they are to be kept in good repair. Now it is contended that as at the time when the testator died, the premises were in bad condition, they are only to be kept in that condition. But can I say, on the language of the will, that they are to be kept, not in good, but in bad repair? for that is really the argument. What, then, is meant by good repair? that is the true question.

I must give some explanation to the expression, so as not to do anything not necessary for upholding the buildings in such a state that they may be fit for fair use and enjoyment. They must be put in such a state of repair as will satisfy a respectable occupant using them fairly; but not in that state of repair which an owner or tenant might fancy. I must confess, that how to define good repair I do not know; I am at a loss to find any other terms in which to express it, than those used by the testator himself.

[On the construction of the words, "farming buildings," the VICE-CHANCELLOR held that they included farm houses.]

As to the form of the suggestions to be given to the surveyor, they must be as follows:—

There must be no rebuilding of the mansion or any other of the buildings, except farming buildings, without consent. In rebuilding or repairing, regard must be had to the nature and character of the buildings; and this must be kept in view, to keep them of the same nature and character as before, and of the same

materials; and nothing must be done which can improve them beyond what they were originally. Regard must also be had to what are the funds in hand, and the surveyor must consider, having that in view, what buildings should be repaired at once, and what will be the expense of so doing, and what repairs should be postponed till further funds are available.

1858.

COOKE  
v.

CHOLMONDELEY.

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ROGERS v. WATERHOUSE.

July 28.

Vendor and  
Purchaser.  
*Specific  
Performance.*

**THIS** was a bill for specific performance, filed for the purpose of taking the opinion of the Court on the construction of the will of *Thomas Cooper*. The testator by his will, dated in 1849, gave, devised, and bequeathed "all his real and personal estates and effects whatsoever and wheresoever to the use of his three daughters, *Hannah, Frances, and Sarah*, to be divided in shares, share and share alike; and in case either of them dying, then the shares to be equally divided between the children of the deceased (if any); but if there should be no children to claim their mother's share, then the share to be divided between his two surviving daughters, their administrators and assigns absolutely and for ever," and he appointed the three daughters his executrixes.

Though the Court may entertain a strong opinion in favour of the title of a party, if it were a contest between him and another claiming title, that is not sufficient in a suit for specific performance. To force a title on a purchaser, the opinion of the Court must be so clear that it does not apprehend that another Judge would form a different opinion.

The three daughters sold and conveyed to the Plaintiff; and the Plaintiff agreed to sell to the Defendant, who objected that the three daughters of the testator were not *seised in fee*, and could not make a title.



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 ROGERS  
 v.  
 WATERHOUSE.

Mr. *Glasse* and Mr. *Riddell* for the Plaintiff, the vendor, cited *Clayton v. Lowe* (a); *Jarman on Wills* (b); *Re Allen* (c); *Gee v. Mayor of Manchester* (d); *Woodburne v. Woodburne* (e). The case is upon the authorities without doubt; the daughters took a clear fee. The first words give a fee, and the contingent gifts over exhaust every contingency. The testator intended the estate to go over in the event of death in his own life only.

Mr. *Bailey* and Mr. *Fry* for the Defendant.

The Court must be clear before it will force a title on a purchaser: *Pyrke v. Waddingham* (f); *Sug. Real Property Statutes* (g); *Wills Act*, s. 28. A gift of "all my estates" may be ambiguous. It is different from a gift to a man and his heirs. In the cases cited words of limitation in fee occurred; *Cooper v. Cooper* (h); *Gosling v. Townsend* (i); *Cambridge v. Rous* (k); *Gawler v. Cadby* (l); *Child v. Giblet* (m); *Jarman on Wills* (n) were also cited.

Mr. *Glasse* in reply.

The VICE-CHANCELLOR :

I am not in this case to determine the question of construction as if it was arising between the Plaintiff insisting that the daughters took estates in fee simple, and any issue of any one of them surviving, contending

- (a) 5 Barn. & Ald. 636.
- (b) Vol. 2, p. 651.
- (c) 3 Drew. 380.
- (d) 17 Q. B. 737.
- (e) 18 Jurist, 184.
- (f) 10 Hare, 1.
- (g) Pages 372, 373.

- (h) 1 Kay & Johns. 658.
- (i) 22 L. T. 125.
- (k) 8 Ves. 12.
- (l) Jac. 346.
- (m) 3 Myl. & K. 71.
- (n) Vol. 2, p. 653.

that that is not the construction; if I were, I should think it necessary, before coming to a conclusion, to go through the cases. But I am only to determine the question between a vendor insisting that there is a good title, and a purchaser insisting that on the true construction there is not; or at least, that there is so much doubt that the vendor cannot have specific performance. Now the rule enunciated by Lord Justice *Turner* is the true rule; and I have to consider what degree of doubt there is.

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 ROGERS  
 v.  
 WATERHOUSE.

Questions of construction of this kind are often very nice and difficult. There are certain rules established no doubt, and this is one:—if a man gives all his estate, or all his property, to *A.* without any words of limitation, the effect of that may be, I do not say invariably is, but may be, (that is, in the absence of anything to lead to a contrary construction,) to give the fee; but the rule is not that such words pass the fee in all cases. Another rule is this; inasmuch as the death of everyone is a certainty, when a testator uses terms of contingency or uncertainty as to death, those terms of contingency are improper, unless the death the testator speaks of is either death at a particular time or under particular circumstances. Another rule is, that if a testator gives to a certain person with words expressly or necessarily giving the fee, and then says, in case of the death of that person without more; the Court will refer the period of death to the contingency of its happening before that of the testator; and if this case came within that rule, I should decree for the vendor. But here we have language which admits of a good deal of argument, and of reference to numerous cases, which shows it is a matter not quite clear.

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WATERHOUSE.

[His Honor then referred to the words, "in case of either of them dying." ]—Now those are words of contingency; but then he provides for two contingencies, their dying leaving issue, and their dying not leaving issue. So that, though the words import generally dying, they are followed by a double contingency. I cannot say that the Court might not come to the conclusion contended for by the Plaintiff; but neither can I say that that is the clear construction. Then with regard to the contingency. I will not say that I have not an opinion in favour of the construction of the Plaintiff; but I do not think it right to go into reasons for that opinion, or to express to what extent it goes; for it does not appear to me that I can say I have so clear an opinion, as to think that no other judge could take a different view; and in that state of things I can make no decree.

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1858:  
December 8.

*Priorities.  
Negligence.*

ESPIN v. PEMBERTON.

THE bill in this case was filed by an equitable mortgagee of certain property of the Defendant *Pemberton*, (prior in date to the conveyance to *Brown*, one of the Defendants) to obtain priority over *Brown*, notwithstanding the conveyance to *Brown* was of the legal estate.

*Pemberton* was a solicitor and, being in want of money, applied to his step-son *Brown*, who was his articulated clerk, and had just attained his majority. *Brown*, being entitled to some reversionary property, procured an advance of 1,500*l.* from an insurance office, and lent it to *Pemberton*, who promised him a security upon the property mortgaged to the Plaintiff, not disclosing the fact of that mortgage. *Brown* asked at the time of advancing his money, and from time to time afterwards, for the title deeds, and was told by *Pemberton* that he should have them, but he could not immediately lay his hands upon them.

It appeared also that a clerk in the office, one *Nugel*, also frequently pressed *Pemberton* to give a security to *Brown*, and ultimately prevailed. It was then arranged that instead of a mortgage, *Brown* should in consideration of 500*l.*, have an absolute conveyance; and such conveyance was prepared some time before September, 1857, by *Nugel*. No separate solicitor was employed in the matter by *Brown*; and towards the month of

*A.*, an articulated clerk to *B.*, a solicitor, and also his step-son, lent him 1,500*l.* on the promise of a security on lands. He asked for the title deeds, but omitted to require possession of them before advancing the money, on the mortgagee's stating he should have them, but could not immediately lay his hands upon them. Afterwards finding the mortgagee embarrassed, he pressed for and obtained an assignment. The property was afterwards found to be under equitable mortgage to *C.*

Held, that *B.*'s knowledge did not affect *A.* with constructive notice, and

that the circumstances were not such as to amount to fraudulent negligence in *A.* so as to postpone him to *C.*

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ESPIN

v.

PEMBERTON.

September, *Brown* finding that *Pemberton* was much embarrassed, pressed for the conveyance, which was ultimately brought to him on the 8th September, 1857, ready engrossed, and was immediately executed.

Mr. Glasse and Mr. T. H. Terrell for the Plaintiff.

There can be no room for doubt about the principles that govern this case. It is settled as a general rule that whoever is first in time is first in order, the estates being equal; and that if the first is a mere equitable estate, and the second a legal estate, the second will be preferred if there are *bona fides* and proper care. But it is equally settled, that a second legal incumbrance may be postponed to the prior mere equitable incumbrance, if the party who has got the legal estate has got it either fraudulently, or even with that degree of carelessness which amounts to *crassa negligentia*. Then we say that *Brown* did not take the assignment as a security for his debt. It was not made till September, and during all the interval, nothing was done. The avowed reason of his taking it was that *Pemberton* was becoming embarrassed. It was not taken in consideration of the debt, or by agreement, but long after the debt was contracted; the debt was not contracted on the faith of a conveyance of the legal estate. There is no reasonable excuse or reason for *Brown's* never having sooner obtained the deeds. He left them with gross carelessness in the hands of *Pemberton*. Is not this a case of wilful blindness, and is it one which entitles *Brown* by virtue of the legal estate to priority? [They contended also that as *Pemberton* was the only solicitor employed, he was the solicitor of *Brown* as well as his own, and therefore that *Brown* had constructive notice of the antecedent mortgage, and they referred to *Hewitt v. Loosemore* (a).]

(a) 9 Hare, 449.

Mr. *Bailey* and Mr. *Beale*, for the Defendant, were not called upon.

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The VICE-CHANCELLOR :

When this case was first presented to me, it appeared to me to be one of strong suspicion. Here is, first, a gentleman, the Plaintiff, who has a mortgage by deposit, and then in November, 1857, Mr. *Brown* the step-son of Mr. *Pemberton*, a young gentleman just over twenty-one, the articulated clerk of Mr. *Pemberton*, gets an assignment made to him of the property in question. I must say at first sight it looked suspicious. But suspicion, though a ground for looking with great care at the circumstances, yet if it remains mere suspicion, not confirmed, is not a ground for relief.

At first sight it seemed also suspicious that a young man, only twenty-one, should be represented to have lent 1,500*l.* to his step-father. However, on the evidence it seems unquestionable that he did get an advance of 1,500*l.* on some reversionary rights from an insurance office, and did actually lend it to *Pemberton*. That ground then of suspicion is removed. Nor is there any reason to question that *Pemberton* did propose to give a security, and did propose the very property that was in mortgage to the Plaintiff. And afterwards there was an arrangement for an absolute conveyance in consideration of 500*l.* *Nuget* who was a clerk in the office, appears to have frequently urged *Pemberton* to give a security to *Brown*; and, in consequence, *Pemberton* was induced to do something.

Now, with respect to direct notice, Mr. *Nuget* swears that until the 6th November, 1857, when the Plaintiff

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came to the office, and stated the fact of his mortgage, he had not any idea of its existence; and I find nothing to show that *Brown* had, and I take it as clear that he had not notice.

Then it appears that the deed was brought to *Brown* ready engrossed on the 8th of September, and that is insisted upon as a suspicious circumstance. But it seems the security had been prepared long before, and was prepared by *Nuget*, who had, as I have observed, interfered; and that accounts for the deed being brought already engrossed, and being at once executed. Then it comes to this: that a young man, whose step-father is in want of money, raises it and advances it to him on a promise of a specific security; and it appears to me that the relative position of the parties removes instead of raising suspicion.

The grounds taken in argument on behalf of the Plaintiff, are two:—

1st. That *Pemberton* acted as solicitor in the transaction, and that as he knew of the prior equitable mortgage: that was constructive notice to *Brown*.

2nd. That there was that degree of negligence on the part of *Brown* in not requiring or inquiring about the possession of the deeds, which will postpone him.

Now from the case of *Hewitt v. Looemore*, which has been referred to, it appears that the Lord Justice had come to a similar decision in a former case, and I confess I am bound to state, that if it were not for that opinion, I doubt whether I should arrive at the same conclusion. If I consider many cases which might

occur, I cannot see the reason for concluding that because the mortgagor is a solicitor, he is necessarily solicitor for the mortgagee. The mortgagee may himself be a solicitor or a barrister, and not choose to employ any other solicitor; and it would be a hardship upon him to say that because the mortgagor is a solicitor, he is therefore to be treated as the mortgagee's solicitor.

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But, taking it to be so, taking *Pemberton* to have been *Brown's* solicitor, the Lord Justice in the case cited and in the preceding case, intimated that there was no reason for saying that the mortgagor's knowledge of the prior security is to have effect by way of constructive notice; and I come to the same conclusion. That would indeed be a double construction; a construction upon a construction. It appears to me that there is no ground for saying that *Brown* had constructive notice.

Then as to the suggestion that *Brown* is postponed by reason of not having obtained the title deeds, the rule is, no doubt, that if a subsequent mortgagee is guilty of fraud, or of such negligence as the Court holds equivalent to fraud, in not getting the title deeds, or in abstaining from asking for them, then the Court will postpone him.

But here is there not a reasonable ground assigned for *Brown* not having got the deeds? It appears that he had asked for them at first, and afterwards applied for them constantly. Here was a young man barely more than twenty-one, living in the house of his step-father, and being his articulated clerk; he was of course under his influence, and his step-father, on his applications for the



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deeds, tells him "you shall have them," giving some excuse why he could not immediately lay his hands upon them. That does not, I think, make the young man guilty of fraud. He was not assisting Mr. *Pemberton* in keeping, on the contrary he was endeavouring to obtain the title deeds. I cannot come to the conclusion that he has been guilty of any fraudulent negligence, and I am of opinion on the whole of the circumstances, that the Plaintiff has not made any case for the relief asked; and the bill must be dismissed with costs(a).

(a) This decision was affirmed on appeal, 28th January, 1859. See 5 Jur. N.S. 157.

December 15.

  
*Conditions of*  
*Sale.*  
*Sale.*

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**SMITH *v.* WATTS.**

The particulars of sale described the thing to be sold as an improved ground-rent, amply secured, and stated the property to be held under a sub-lease of the full term of the ground lease.

The conditions of sale provided that no objection should be taken

by reason of the sub-lease being in excess of the superior lease, and offered previous inspection of the leases, and provided that the purchaser should be held to have notice of the leases, and their effect, whether he inspected or not.

Held, that the particulars disclosing the *facts*, and the conditions referring to the *facts*, the purchaser was bound, though the particulars and conditions did not particularly state the legal effect; particularly having regard to the circumstance that inspection was offered.

**THIS** was an adjourned summons to take the opinion of the Court whether a purchase under decree of the Court, under conditions of sale framed by one of the conveyancing counsel of the Court, could be forced on the purchaser. The property sold was a ground rent purporting to be secured on leasehold premises.

The particulars of sale were as follows: — Lot 2. A leasehold ground rent of 50*l.* per annum, *amply secured* on six dwelling houses at , producing a rack rent of 250*l.* per annum; let to Mr. *Burstal* on a lease dated 1st of December, 1841, *for the whole term*, at per annum

82*l.* ; held under two leases dated the 26th of December, 1834, direct from the Earl of *Cadogan*, for a term of which twenty-six years will be unexpired at Christmas, 1858, at ground rents amounting together to per annum 32*l.* Net improved ground rent per annum for twenty-six years, 50*l.*

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The eighth condition of sale contained the following passage :—"The purchaser shall not make any objection or requisition by reason of the term purported to be granted by the said indenture of the 1st of December, 1841, being in excess of the term granted by the said leases from the said Earl of the tenements comprised in that indenture, or by reason of any variance between the covenants and conditions in the said last-mentioned indenture, or the said underlease and the covenants and conditions of the lease or leases from the said Earl, inasmuch as the said leases from the said Earl and counterparts of the said underlease and of the said indenture of the 1st of December, 1841, or copies thereof respectively, may be inspected for ten days immediately preceding the day of sale at the office of Messrs. ——— (the vendor's solicitor): the purchaser shall be deemed to buy with full notice of and subject to the contents and effect of those respective instruments, whether he shall make such inspection or not."

*Mr. Glasse* and *Mr. Roberts* for the Plaintiffs, the vendors.

The objection taken by the purchasers is that we do not make a good title ; that by reason of the underlease being equivalent in duration to the superior lease, the reversion is gone, and that there is no power of distress. In answer to that we contend :—

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1st. That there is an express right of re-entry reserved in the underlease, and distress is incident to that, though there be no reversion (a).

2nd. However that may be, there is clear notice on the particulars of there being no reversion. The purchaser knew what he was buying. The eighth condition is framed to meet, and does meet, and that clearly, this very objection. It does not, it is true, use the words right of distress, but it refers to the sub-lease being in excess of the ground lease, and shows clearly what is the defect of title. The leases themselves were open to inspection, and by the contract the purchasers buy with notice of their contents and effects.

Mr. *Baily* and Mr. *Martineau* for the purchaser were not called upon to argue that there was no power of distress, counsel on the other side conceding on the Vice-Chancellor's intimation of opinion, that that point was too doubtful to force the title on a purchaser.

On the particulars and conditions :—

The particulars say the ground rent is amply secured. Are we fairly told how it is not amply secured? No, the language carefully considered by a lawyer might be so understood, but not by any ordinary person. If the statement had been that there was no right of distress, everybody understands that; but it requires a lawyer to know that the inference from there being no reversion is, that the right of distress is gone. No ordinary person without a lawyer at his elbow could collect such an inference from these particulars.

(a) Bac. Ab. art. Rent, 4th div. of letter K, and 5 Man. & Ryl. 157, note.

Then as to the condition ; does it fairly point out the blot ? No ; it wraps it up in guarded language, leaving, like the particulars, the inference to be collected. What ordinary person could tell on reading those particulars that it was the absence of a right of distress that was referred to ? Why was not the condition so expressed as to say that no objection should be taken for want of a right of distress ? We say the condition is so framed as to mystify and mislead any ordinary person. True, a lawyer would understand it, but a purchaser in an auction room is not bound to be provided with a lawyer, and it has been decided again and again that restrictive conditions of sale ought to be intelligible to ordinary men of business : *Dykes v. Blake* (a) ; *Seaton v. Mapp* (b).

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The VICE-CHANCELLOR :

If the question were merely that Lord *Cadogan* having granted a lease, a certain under-lease was equal in the term of its duration to Lord *Cadogan's* lease, and whether in that state of things there is a good right of distress, that question is in my mind one of great doubt, and I do not think the title could be forced on the purchaser.

But it does not rest on that. The question is whether the particulars and conditions of sale point out to a man of ordinary intelligence, what are the facts of the case ; and whether the eighth condition does not fairly stipulate that no objection shall be raised on that state of facts ? [His Honor here referred to the particulars.] It is there expressly stated that the premises are the subject of two leases from Lord *Cadogan*, the rent reserved by which is 32/. The particulars also state that

(a) 4 Bing. N. C. 463. (b) 2 Coll. 556.

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the premises are sub-let at a rent of 82*l*. Thus far they are clear not merely to a legal mind, but to any person of ordinary intelligence, who would understand that the sub-lease granted by the lessee was equal in duration to the whole term granted by Lord *Cadogan*. I do not say he would necessarily understand the legal consequence ; even lawyers may differ about that.

Then it is said, that there are words in the description which express that the rent sold is amply secured, and that that is a misdescription. But what is the meaning of saying that it is amply secured, and then showing how it is secured ? Why merely that the vendor considers it under the circumstances stated amply secured. No doubt it might be otherwise determined, but that is his view ; is that a misdescription ? I think not, the mode in which it is secured being pointed out, so that it was as open to the purchaser as to the vendor to form a judgment upon it.

Then as to the eighth condition of sale, it appears to me extremely fair. I cannot say that I entertain any doubt about its meaning. I do not see that any man could entertain doubts about the facts of the case ; and he would know from the condition that he might have inspection of the leases, and the means of taking an opinion if he entertained doubts of the effect. The true question is, what is the effect of the eighth condition ? In it every purchaser is told that he may go and look at the documents. If he does not know their legal consequence and effect, he must inquire. I see nothing at all to mislead in the condition ; and when I find in the particulars a true representation of the facts, I cannot say that anything has been done to conceal the defect from the purchaser. I must therefore hold him concluded by the particulars and conditions of sale.

1859:  
January 17.

Will.  
Construction.  
Annuities.

BIGNOLD v. GILES.

**T**HIS cause had stood over from the original hearing for the purpose of having the representatives of *Robert Samuel Hibberd* brought before the Court, to argue the question now argued, which turned on the will of *Joachim Hibberd*.

*Joachim Hibberd* by his will appointed his brother *Joseph Hibberd* and *Charles Beale* (both since deceased) joint executors of his will, and devised to them all his freehold and leasehold estates, in trust to sell the same as therein mentioned; and he gave and bequeathed unto the said *Joseph Hibberd* and *Charles Beale*, and to the survivor of them, their or his heirs, executors or administrators all his monies in the funds, and all other his real and personal estate, property, and effects whatsoever and wheresoever as therein more fully mentioned, to hold the same in trust to sell and dispose of the same as therein mentioned, in order to reduce and turn the whole and every part of all his real and personal estate, property, and effects into one aggregate sum of money for the better and more convenient distribution thereof in the manner thereafter mentioned; and he directed that when and as soon as such aggregate amount could be ascertained, including the 4,300*l. which he had in the £3 per Cents.*, the whole should be divided into two equal moieties, and when so divided, in trust that the said *Joseph Hibberd* and *Charles Beale*, and the survivor of them, their or his executors or administrators, should, by and out of one moiety or half part of the said aggregate amount, and of which the said

By a will a sum of Stock was given to trustees, out of the dividends to pay annuities to A., B. and C. for their lives, and after their deaths to pay the annuities to E., F. and G., without saying for life or otherwise; and after the death of survivor of E., F. and G., to pay the Stock to H. Held, that the annuities were to endure till the death of the survivor, and the representative of a deceased annuitant was entitled till the death of the surviving annuitant.

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4,300*l.* in the £3 per Cents. should be a part, pay and discharge any balance that might be a fair statement of all debts and credits appearing due from the testator to the said *Joseph Hibberd* as his partner in the plastering business, together also with the testator's just debts and funeral expenses, and the costs and expenses of proving his will, together also with the legacies therein mentioned (being eleven legacies of 5*l.* each), and after payment of the before-mentioned charges and legacies, in trust to invest the surplus or remainder of such moiety also in the government stocks or funds in the names of them the said *Joseph Hibberd* and *Charles Beale*, or the survivor of them, their or his executors or administrators, in trust to pay and apply the annual dividends and interest thereof (including also the annual dividends and interest of the said 4,300*l.* then already invested as aforesaid) unto his the testator's dear wife *Ann Hibberd* (since deceased) during her life, provided she should remain his widow, but in case of her death or future marriage, which should first happen, then he gave and bequeathed such moiety of the said aggregate amount unto *Ann Beale*, therein described as the wife of the said *Charles Beale*, as her own sole property for ever, *save and except the said sum of 4,300*l.* in the £3 per Cents.*, which the testator directed should remain there and be transferred into the names of the said *Joseph Hibberd* and *Charles Beale*, or the survivor of them, their or his executors or administrators, for the uses and purposes following (that is to say) *as to the annual dividends or interest then payable thereon amounting to 129*l.* per annum, in trust to pay to his brother James Hibberd, and to his two sisters Patience Lane and Susannah Bowring (all since deceased) one clear yearly annuity or sum of 20*l.* each during their lives, and the remainder of the said dividends or in-*

terest of 129l. he directed to be paid to his nephew *Robert Samuel Hibberd* (since deceased) during his life; and as and when the testator's said brother *James* and sisters *Patience* and *Susannah* should depart this life, then he directed that the three several annuities of 20l. each should devolve and be paid to *Louisa Hibberd* (afterwards the wife of *Stephen Webb*), the said *Robert Samuel Hibberd*, and *Elizabeth Hibberd*, afterwards the wife of *John Riley* (and since deceased), the eldest taking the first of the said annuities that should fall, and the others in like manner by seniority; and after the decease of the survivor of them the said *Louisa Hibberd*, *Robert Samuel Hibberd*, and *Elizabeth Hibberd*, then the testator gave and bequeathed the principal sum of 4,300l. in the £3 per Cents. and all interest due thereon (if any) unto the said *Ann Beale*, her heirs and assigns, and to be disposed of by will or otherwise, as she might think fit.


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*Louisa Webb* was still living; *Elizabeth Hibberd* and *Robert S. Hibberd* were dead, and the question was as to *Robert S. Hibberd*, whether he took his annuity only for life, or whether it was for the life of the survivor of the three annuitants.

Mr. *Goldsmid* and Mr. *Martindale* for the Plaintiff, who claimed under *Ann Beale*.

The gift is simply of annuities. That a fund is set apart to pay them makes no difference. A fund must in all cases be provided for the payment of annuities. The annuities are originally given for lives; that shows that the testator had nothing more than common life annuities in view.



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Mr. *Glasse* and Mr. *W. W. Cooper* for the representatives of the testator.

Mr. *W. P. Murray* for the representative of *R. S. Hibberd*.

This is not a mere annuity; it is a gift of the dividends of a specific fund to support an annuity; that makes it *prima facie* a perpetual annuity. Here it is only cut down by the gift over to *A. Beale*, which is expressly only to take effect after the death of the survivor of the three annuitants: therefore *R. S. Hibberd* took till the death of *Louisa Webb*, and his representative is still entitled during the life of *L. Webb*.

The following cases were cited:—*Robinson v. Hunt* (a); *Wilson v. Maddison* (b); *Stokes v. Heron* (c); *Kerr v. Middlesex Hospital* (d); *Blewitt v. Roberts* (e).

#### The VICE-CHANCELLOR :

This is a question of some doubt and difficulty; if I were to rest only on the first principles applicable to gifts of annuities irrespective of authority, the matter stands thus:—An annuity is a right to receive *de anno in annum* a certain sum; that may be given for life, or for a series of years; it may be given during any particular period, or in perpetuity; and there is also this singularity about annuities, that although payable out of the personal assets, they are capable of being given for the purpose of devolution, as real estate; they may be given to a man and his heirs, and may go to the heir as real estate—so an annuity may be given to a

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| (a) 4 Beav. 450.           | (c) 12 Cl. & Fin. 161.      |
| (b) 2 Y. & Col. N. C. 372. | (d) 2 De G., M'N. & G. 576. |
|                            | (e) Cr. & Phil. 274.        |

man and the heirs of his body ; that does not, it is true, constitute an estate tail ; but that is by reason of the statute *de donis*, which contains only the word *tenements*, and an annuity, though a *hereditament*, is not a *tenement* ; and an annuity so given is a base fee. Now we know that if real estate, that is, specific real estate, is given to a man without words of limitation, that creates a life estate only ; and when an annuity is given without words of limitation, the question is what is that estate : is it a life estate only or a perpetuity ? If it were regarded as real estate, the want of words of inheritance would cause it to be no more than a life estate ; but if you regard it as personal estate, then the want of words of inheritance does not prevent it from being an absolute gift. In the vast majority of cases, there is no doubt that the real intention of the testator in giving an annuity, is only to give it for life ; and I must assume that the current of decision is to this effect, that if there is a gift of an annuity to A. simply, and nothing more—nothing said whether it is to be for life or absolutely—it is a gift of an annuity for life only. If that be so, it appears to me that if you add that the annuity so given shall be provided for by the investment of a sum of money, which is only the testator doing what the Court would do, I should have thought upon principle, that that would not alter the effect.

But this appears to me at least clear ; that if the gift of what is called an annuity is so made, that, on the face of the will itself, the testator shows his intention to give a *certain portion of the dividends of a fund*, that is a very different thing ; and most of the cases proceed on that footing. The ground is, that the Court construes the intention of the testator to be, not merely to give an annuity, but to give an aliquot portion of the income

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arising from a certain capital fund. And the question I have here to determine is, whether, on the terms of this will, the gift is of an annuity simply, or of a certain portion of the income arising out of a particular sum. Now this is not "I give to *A.* an annuity of 20*l.*:" it is very different. — [His Honor then referred to the language of the will, particularly the passage in italics, in pp. 34, 35, and then continued :]—

This is a direction how the trustees are to deal with the dividends of this specific sum of Stock. Before any gift of an annuity, there is the trust to deal with the dividends. It is a trust of the dividends of the sum of 4,300*l.* Stock, out of which the brother is to have 20*l.*, an aliquot proportion, his sisters 20*l.*, and the remainder of the *dividends* to his nephew. This is very different from a mere gift of an annuity.

[His Honor then referred to the words of the gift to *Louisa Webb, R. S. Hibberd* and *E. Hibberd*, noticing the absence of any language indicating an intention to limit the gift to life, and proceeded :]—What is there, if we stopped here, to prevent the parties taking for ever, if there were no subsequent language to alter it? It is really no more than a gift of dividends to *A.* for life and afterwards to *B.* It happens however that there is in this will a direction to terminate the duration; the will says, after the decease of the survivors of the three, the fund is to go over, and it is to be remarked that it is then for the first time given to *Ann Beale*—she had no previous interest in this money. Another observation occurs; the testator, when he means to give life annuities, has expressed them to be for life, from which it may be collected, and the argument is not without weight, that

when he does not so express himself, he does not intend to limit the duration.

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Further, the gift over being to *Ann Beale* only after the death of the survivor, it would be contrary to the very terms of the will itself, to give it to her sooner.

It appears to me that, for all these reasons, both on principle and on authority, this is clearly a case not within the class of cases of a mere gift of an annuity; and that the annuity to *R. S. Hibberd* continued till the death of *L. Webb*. It follows that *R. S. Hibberd* having died before his annuity fell due, his death did not prevent his being entitled to it, and it passes to his representative.

1858.
Nov. 8.

*Mortmain.
Descriptio
Personæ.*

THORNBUR v. WILSON.

A gift to "the then minister of the Catholic Chapel at *K.* of a surplus of the produce of the sale of some of testator's real estate, held void.

THE testator in this cause devised to the officiating minister of the Roman Catholic Chapel of *Kendal*, for the term of seven years, the rents and profits of certain real estate. This devise the Court had on a previous occasion determined to be invalid, as being within the Mortmain Act (*a*), and the cause now coming on again the opinion of the Court was desired on the devise to trustees, subject to the said term of seven years, on trust to sell and to pay his funeral and testamentary expenses and certain legacies, and as to the surplus, on trust to pay it "to the then minister of the Roman Catholic Chapel at *Kendal*" to whom he bequeathed the same, and he made him also his residuary legatee. The nephew of the Roman Catholic minister living at the testator's death claimed the surplus money produced by the sale.

Mr. Glasse and *Mr. Sidney Smith* for the Plaintiff.

Mr. Wickens for the Crown.

The decision upon the gift of the rents for seven years in fact governs this, the gift is to the same person and in the same language; it is clear the testator did not mean a personal benefit to *A. B.*, merely describing him for certainty by his office, but a gift to whoever should be minister of the chapel, that is, a gift to the chapel, and that is void.

(*a*) See 3 Drew. p. 245.

Mr. *Shapter* and Mr. *Wakefield* for the nephew of the Roman Catholic minister.

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THORNER.

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The gift is to the *then* minister; not to whoever should be minister. He describes him by his office, not as a gift to the office, but as a mere *descriptio personæ*.

Mr. *Anderson*, Mr. *Speed* and Mr. *Nalder* for other parties to the suit. The following cases were cited: *Forbes v. Smith* (a); *Roberts v. Walker* (b); *Houghton v. James* (c); *Cable v. Cable* (d).

THE VICE CHANCELLOR:

After referring to the will, I cannot entertain any doubt that the intention was to benefit the minister as such, that is, the chapel. The question whether there is a charitable gift does not depend on the fact that there is a gift to an individual describing him as minister; but on this, whether the testator designates the individual as such, or as being the person who happens to fill the office. A gift to a minister as such, is a charitable bequest. I think here the intention was clearly to benefit the minister and chapel; it was not a personal bequest, with a description of the person to be benefited. A gift to the person *now* minister would have been different; the testator might be unacquainted with his name, and so only be capable of describing him by his office. And here the surplus is only to be realised at the end of seven years after the testator's death, which makes it stronger to show that the testator meant to benefit the chapel, not the particular person. Held, therefore, that the gift was void.

(a) 1 Phil. 629.

(b) 1 Russ. & Myl. 752.

(c) 1 H. of L. Cases, 406.

(d) 16 Beav. 507.

1858.
Nov. 22.

*Mortgagor and
Mortgagee.
Condition of
Sale.*

FALKNER v. THE EQUITABLE REVER-
SIONARY SOCIETY.

A condition of sale on a sale by a mortgagee under a power of sale, entitling the vendor to rescind the contract in case he should be unwilling or unable to answer any requisition, is depreciatory in a sense, but not so depreciatory as to be improper, being one that a prudent owner would introduce; and therefore held binding on the mortgagor.

FOUR persons entitled to a certain interest under the will of *James Reade* joined in mortgaging it to *Francis Falkner* and *Frederick Falkner* to secure 5,400*l.*; the mortgage deed contained a power of sale, "subject to such special conditions of sale" as the mortgagees should think proper.

The mortgage debt not being paid the mortgagees sold to the Defendants under, among others, the following condition of sale:—"In case any objection or requisition be made in respect of the title or otherwise which the vendors are unwilling or unable to remove or satisfy, the vendors shall be at liberty to rescind the sale on returning the deposit with interest or costs, notwithstanding any steps taken by them in the meantime to clear up any such objection or comply with any such requisition."

The purchasers objected that this was a depreciatory condition, and which the mortgagees had no power to make, and insisted on the concurrence of the mortgagors.

The bill was filed for specific performance, and the material question was that above stated.

Mr. *Anderson* and Mr. *Rendall* for the Plaintiff.

The condition is one which mortgagees might insert irrespectively of any special power. Mortgagees are

not strictly trustees, and are not bound by all the rules that bind trustees. Besides this is not a depreciatory condition; it does not affect the title, and so diminish the price. In truth, in practice much more stringent conditions are found not to damp a sale. And further, here the mortgagees are expressly authorized to sell under such special or other conditions of sale as they think fit. Such a power would be a nullity if it did not authorize such a condition as this. [They cited—*Davidson and Wright's Conv.* (a); 9 *Jarm.* (b); *Hobson v. Bell* (c); *Hoy v. Smythies* (d); *Cholmondeley v. Clinton* (e); *Borell v. Dann* (f); *Abbott v. Darnell* (g).]

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Mr. *Bailey* and Mr. *G. M. Giffard* for the Defendants.


The title is to say the least doubtful. Mortgagees are in a sense trustees. They have at any rate no right to insert conditions that will damp a sale; they are bound to sell fairly, and not recklessly. The power of sale does not authorize such a condition as this; it is only a general power to make conditions; that means reasonable conditions. Here the mortgagors are not before the Court. They might contend that the sale is not good, and in their absence the Court will not pronounce. [They cited *Pyrke v. Waddingham* (h).]

Mr. *Anderson* in reply.

The VICE-CHANCELLOR:

The parties have agreed that this case shall be dealt

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| (a) Vol. 1, pp. 441—581. | (c) 2 Jac. & W. 182. |
| (b) Edit. Sweet, 21. | (f) 2 Hare, 440. |
| (c) 2 Beav. 17. | (g) 2 Jur. N. S. 631. |
| (d) 22 Beav. 510. | (h) 10 Hare, 1. |

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with on the footing that there is nothing in contest between them except the question of title upon the objections that have been argued (a). If, therefore, I am of opinion that if either of the objections is sufficient, I can only dismiss the bill; but if neither of the objections is sufficient, then there must be a decree for specific performance. Upon that footing I now proceed to express my opinion. The first objection turns upon this, that the sale is made by the Plaintiffs not as absolute owners, but as mortgagees under a power, and I am to consider whether the sale has taken place under such circumstances that the mortgagors cannot impeach it. The objection is that the condition is improper as being a depreciating condition.


Now that objection is, that although it is true there is a power of sale, and a power to sell under special conditions, the condition is of that nature that if a sale takes place under it, the mortgagors not concurring, they may impeach it, and they may succeed. That objection therefore turns upon the rights of third persons not parties to the contract.

Now it is said that the 9th condition is a depreciating condition; that its tendency is, firstly, to diminish the number of persons willing to bid; and, secondly, as to those who do come and bid, to diminish the price that they will offer.

Now let us consider what are the rights of a mortgagee under a power of sale, more especially when the mortgagee has given him an express power to sell under such special conditions as he may think fit. I am not

(a) There was a second objection, which is not here noticed, as it turned on points not material to be reported. See p. 359.

disposed to say that any condition, whatever be its nature, would be justified under this special power; but I do say that the effect of the power is that any condition, whether special or not, that a prudent and reasonable owner, selling in his own right, would impose, is a condition justified by this power.

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Now even without that special clause in the power, what are the relative positions of the mortgagee and mortgagor when the mortgagee is selling? A mortgagee is certainly not a mere trustee; he stands in a very different position; he has his rights, viz. a beneficial interest in realising the security so as to get his principal interest and costs. It is true the Court will not allow him to exercise that right without a due regard to the interest of the mortgagor; and the interest of the mortgagor requires that the sale shall take place as beneficially for the mortgagor as if he were himself selling. This however must be borne in mind, that though of course the object of the mortgagor is to realize the largest amount that can be got, yet it does not follow that conditions of sale, the effect of which would be to obtain the largest possible amount at the sale, are always the best for the mortgagor; for they may be such that after selling at a good price, immense expenses may afterwards occur, and after all you may fail in enforcing the contract, which would be to the detriment of the mortgagor. It does not follow therefore that because the conditions do to some extent tend to depreciate the price that will be offered at the sale, they are conditions which are really to the detriment of the mortgagor. If such a condition as this were to the detriment of a mortgagor, it would be equally so when the absolute owner is selling; and yet we find that it is in practice a very ordinary and reasonable condition for an absolute owner to introduce

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in his conditions of sale, and one that, without saying all conveyancers, but at any rate many leading conveyancers, consider extremely proper to be introduced when a mortgagee is selling under a power. The strong impression upon my mind is this, that the question is not simply whether such a condition may tend to diminish the number of buyers, or the sum which any bidder may be disposed to give; but whether it would tend to the detriment of the mortgagor or of an absolute owner, or be prudent in an absolute owner. If it would be prudent in an absolute owner, it is not imprudent as affecting a mortgagor.

Now what is it that is called a depreciatory condition? It is a condition which tends to deter persons from bidding, or to deter those who do bid from bidding up to so high a figure; and a condition which has that tendency, has it because it tends to cripple the rights of the purchaser, to put a fetter on him. Now look at the other conditions in this case which are not objected to; they are as depreciatory as the condition in question. [His Honor then referred to the other conditions, of a usual character, which were inserted, such as a condition for throwing the expence of production and attested copies of documents and others upon the purchaser, observing that they were quite as depreciatory, in the sense of having as strong a tendency to diminish the *number* of bidders, or the *price* that bidders would offer; but that no fault was found with them; and that they were conditions which absolute owners were in the constant practice of introducing as prudent conditions. He then continued :]—

Now with regard to the particular condition objected to, it has this effect; it enables the vendor after any amount of negociation, and after requisitions and at-

tempts to answer them, to say, "I do not say whether I am able or not to answer your requisitions, but I am unwilling to do so, and therefore I rescind the contract." That is the power it gives to the vendor. No doubt such a power might be exercised capriciously, nay, absurdly. But what is the purpose, what is the object of such a condition when an absolute owner is selling? It is that he may place the matter in such a position, that he may have it in his power to escape a Chancery suit. That is the feeling: and it is to escape that, to be able to say, "I will escape from the liability to a suit for specific performance on one side or the other, and its attendant risks and expenses," that this clause has been devised and resorted to. The clause, as originally worded, only provided for the vendor being *unable* to answer requisitions. But in practice it was soon found that saying you are unable, does not show necessarily that you really are unable: so that that clause did not answer the intended purpose. Then conveyancers introduce the word "unwilling," which is the only word that can accomplish the object of giving to a vendor the power of saying, "Rather than incur the risk of litigation, I will give up the expense I have already been put to and rescind the contract." That clause has been found on the whole to be beneficial to vendors being absolute owners. Why should it be less beneficial for a mortgagor when the mortgagee is selling under a power of sale? Recollect that if there is a protracted negotiation, and ultimately a suit, then if the vendor succeeds in enforcing the contract, he has a right no doubt to make the purchaser pay the expenses. But if, on the other hand, he fails to enforce the contract, yet if he has acted properly, as a reasonable absolute owner would do, the mortgaged property, that is the mortgagor, must bear the expenses of the litigation; and

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therefore it is as much for the benefit of a mortgagor as it would be for that of a careful owner that there should be a condition, which, though it may be depreciatory in the sense of deterring bidders from bidding up to so high a figure as they would otherwise do, yet protects him against the risks and expenses of litigation. And indeed in *Hobson v. Bell* that very distinction has been pointed out, that though there may be conditions which are depreciatory, yet they are not so depreciatory as to be improper as between mortgagor and mortgagee. Still, though this may be the opinion of the Court on the effect of the clause, yet if there is a fair and reasonable doubt, the principle of the Court is not to throw a doubt on the purchaser's title. That principle I must of course act upon, following the view, which I entirely adopt, taken by the Lord Chancellor *Turner*, while Vice-Chancellor, in *Pyrke v. Waddington*. Now the question I have to ask myself is this, supposing this sale completed, and afterwards a bill was filed by these four mortgagors, or any of them, against the purchaser on the ground that the condition was an improper condition as regards them; have I any doubt whether the Court would give them any relief? What is the relief they could ask? Why, to be held entitled to recover the property, of course on paying the mortgage money. I confess I cannot say that I entertain any doubt on the subject. I have been much impressed with the observations of the Master of the Rolls in *Hoy v. Smithers*, and I entirely accede to the force of those observations.

[His Honor then proceeded to make some observations on the almost universal practice of inserting such a condition of sale as the one under consideration by conveyancers of eminent practice, and continued :]—

When I find that sales under such conditions have

taken place over and over again, can I conceive that if after all that a mortgagor were to file a bill to recover the property, the Court would give any relief. I confess I cannot come to that conclusion. It appears to me to be a reasonable clause, though depreciatory in the sense in which every clause is that at all fetters the rights of the purchaser ; but that it is not so depreciatory as to be improper as against the mortgagor. And I do not entertain any doubt that the Court would not, on a bill filed by the mortgagors, give any relief. [His Honor then disposed of the other objection, the nature of which was not such as to make it useful to report either the arguments or the judgment, except to state that on that objection also the Court was with the Plaintiff.

[A decree was accordingly made for specific performance with costs.]

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Nov. 23.

*Post Nuptial
Settlement.*

HOGARTH v. PHILLIPS.

A post nuptial settlement was made by A. and his wife of a share of real and personal estate of the wife, in the hands of trustees. No notice was given to the trustees, and no fine was levied. The deed recited the ante nuptial agreement, but it was proved that there never was any. The effect of the settlement was to give the husband a life estate, with remainder absolutely to the survivor, and there was no provision for children.

Held, both husband and wife desiring it, that this deed was a nullity. That as against the husband it was voluntary; and that it was not such a settlement as the Court would enforce against the wife. The property was therefore treated as if it had never been settled.

JOHN ROGER HOGARTH and his wife *Georgina* were married in 1832.

Mrs. Hogarth was under the will of one *Stephen Howell Phillips*, and under a deed of arrangement, entitled to a one-seventh share of his residuary real and personal estate, subject to the life interest therein of *Maria Phillips*.

In 1833 Mr. and Mrs. *Hogarth*, by a deed reciting an agreement to settle before their marriage, assigned all her interest under *Phillips'* will to trustees for Mr. *Hogarth* during his life, and from and after the death of either upon trust as to the corpus, for the survivor. No fine was levied of the real estate, and no notice was given to the trustees of *Phillips'* will. *Maria Phillips*, the tenant for life, died in 1857, and in a suit for the administration of his estate, his real estate being sold, and the fund being paid into Court together with his personal estate, Mr. and Mrs. *Hogarth* both applied to have her share paid to Mr. *Hogarth*. Mr. *Hogarth* swore that no agreement had been entered into for a settlement before the marriage.

Mr. *Baily* and Mr. *Leach* for the Plaintiffs took no part in the contest.

Mr. *Grenside* for Mr. *Hogarth*.

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This deed is as against the husband purely voluntary. It is proved that there was no agreement for the settlement of this property. No fine was levied; the wife's estate therefore in the realty was not barred, and no interest in it passed from her to the husband. As to the personalty, no notice was given to the trustees, nor has Mr. *Hogarth* done anything to assign it since it fell into possession. There is a total want of mutuality, and the wife herself desires to set it aside. He cited *Warden v. Jones* (a); *Bridge v. Bridge* (b).

Mr. *Wright* for the trustees of the settlement. The recital of an agreement cannot be contradicted by parol evidence; it is binding on the husband. Even if the deed were voluntary, the husband could not set it aside; and the wife is incapable of electing to do so. He cited *Whatman v. Gibson* (c); *Smith v. Garland* (d).

Mr. *Jolliffe* and Mr. *W. P. Murray* for other parties.

The VICE-CHANCELLOR:

I was at first strongly opposed to setting this deed aside, even though the wife desires it. There is no instance of a husband being allowed, on his own application, to treat a post nuptial settlement made by him as a nullity. *Bridge v. Bridge* cited for that purpose is not an authority for it; the circumstances were entirely different.

(a) De G. & J. 85.

(b) 16 Beav. 315.

(c) 9 Sim. 196.

(d) 2 Mer. 123.

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In this case, if the husband desired not to treat the deed as a nullity, and the wife desired to set it aside, I do not see how I could sustain such a deed against the wife; a deed giving the husband so great benefits; making provision for the wife only in the event of her surviving her husband; and making no provision for her children. How could I say that such a deed should stand against the wife? But then if it could not stand against her, it could not stand against any other person. The settlement operated nothing against her as far as the personalty is concerned. Nor is there as to the realty anything to bind the wife. No interest, therefore, passed from her to the husband, and undoubtedly therefore on his part it was purely voluntary. As against anybody but the wife it would be certainly inoperative, as the acts necessary to constitute a trust were not done. There has been no attempt to give a legal interest to the trustees. I must consider it therefore as against the husband voluntary; and certainly it is not such a settlement as the Court would support against the wife. I shall therefore consider this as the wife's property as if it were not settled; and if she desires it to be paid out to the husband, her consent must be taken.

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6 July.

Power.
Will.

ORANGE v. PICKFORD.

A power was vested in *Hannah Flint*, the testatrix in this cause, to direct, limit or appoint under her marriage settlement certain real estate for such estate or estates, &c., "as she the said *Hannah Flint*, notwithstanding her intended coverture, and as if she were a feme sole, at any time or times during her life, by any deed or instrument in writing, with or without power of revocation, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, should direct, limit or appoint." She by her will attested by three witnesses, reciting the power, made an appointment.

A power to a married woman to appoint at any time or times during her life by any deed or instrument in writing, to be sealed and delivered in the presence of two or more witnesses, is well executed by an appointment by will before the Wills Act, sealed and delivered, as well as signed and published in the presence of three witnesses.

The attestation of the will stated that it was signed, sealed, published and declared, and also sealed and delivered in the presence of three witnesses. The question argued was, whether this was a good execution of the power.

Mr. *Bazalgette* and Mr. *Welford* for the parties claiming under the will.

This is a sufficient execution of the power; the appointment was to be made by any deed or instrument in writing. A will is an instrument in writing; that has long been decided, if it were not clear without decision.

That the will was executed in the presence of three witnesses is immaterial, the power expressly speaks of

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two or more. The excess cannot vitiate the execution ; and the will was sealed and delivered, so that all the formalities have been satisfied.

Mr. *Glasse* and Mr. *W. D. Lewis* *contrà*. This power obviously contemplated only a deed ; the words, "instrument in writing," no doubt may mean or be technically satisfied by a will. But the question is one of intention ; did the settlor mean a will, or did he not use the words "instrument in writing," only as a substitute for a deed, on the ground of doubt whether a feme covert could execute a deed strictly so called. Then it is to be with or without power of revocation. These words plainly show a deed was contemplated ; for a will could not be without power of revocation, and to make it with power of revocation would be simply surplusage. The form is precisely that used by conveyancers when they mean to stop short of a will.

Mr. *C. Hall* for the executors.

The following cases were cited :—*Buckell v. Blenkhorn* (a) ; *West v. Ray* (b) ; *Man v. Ricketts* (c) ; *Col-lard v. Sampson* (d).

THE VICE-CHANCELLOR :

I think this was a good exercise of the power. The authorities divide themselves into two classes, those on the words of the power, and those on want of formal execution. The mere question whether a will comes within the words instrument in writing has long

(a) 5 Hare, 131.

(b) Kay, 389.

(c) 7 Beav. 95.

(d) 4 De Gex, M'N. & G.
224.

ago been decided in the affirmative, and there is neither decision nor dictum throwing any doubt on that.

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The question in this case is, have all the requisites of the power been complied with. The execution must be "during her life." Now when once you decide that a testamentary instrument is an instrument in writing, it must be made during the life, and therefore is within the terms of the power. Then as to the words "at any time or times," they are just as applicable to a will as to a deed. Then come the words with or without revocation, and it is argued that those words are absurd as applied to a will—but the answer to that argument is, that those words in the power have reference to a deed, which is one of the modes of execution, and not to a will. Then it is said, that requiring the instrument to be sealed and delivered is not appropriate to a will. But though it is not necessary that a will should be sealed and delivered, yet it is capable of sealing and delivery. Then come the words, "in the presence of two or more credible witnesses." Here the will being made before the Wills Act would require three witnesses, while the power *required* only two. But it authorized more than two, and if there are more than two that does not vitiate the execution; it may be read—by two if a deed, and if a will by more than two. The instrument is, I think, an instrument in writing; it is executed during her life; from its very nature, with power of revocation; it is sealed and delivered, and in the presence of three witnesses. I think therefore that it was, within the authorities, a due execution of the power.

1857, 1858 and
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Domicile.

Discussion of the rules as to domicile, and definition of domicile.

A. a Scotchman, whose family had for 200 years owned a small estate in *Scotland*, went to *India*, and there resided for many years. He then returned to *Scotland*, and lived on the family estate for some years. He then, under the influence of several motives, the most apparent of which was to educate his sons at a particular school in *Switzerland*, went to live in *Switzerland*; shortly afterwards he withdrew his sons, and went with his family to *Paris*, where he lived for five years, living in apartments taken for a lease and furnished by himself. He died in *France*. The evidence as to his intending to return to *Scotland* was conflicting; the principal evidence in favour of such intention, was that he kept up his Scotch property, and by correspondence directed the management of it with great minuteness.

Held, without positively deciding that there was a balance of evidence; that you must have stronger evidence to show abandonment of original domicile for a foreign domicile, than to show retention of original domicile; and that in this case the testator's domicile remained Scotch.

LORD v. COLVIN.

THIS case was argued at great length in November and December, 1857, and in July, 1858. Judgment delivered 14th February, 1859.

There were several causes. The cause of *Lord v. Colvin* being between the husband of the widow of the eldest son of Dr. *Peter Cochrane* and the representative of Dr. *Cochrane*. The suits all had reference to claims on Dr. *Cochrane's* personal estate, which was of large amount, and they all came on to be heard together. Two principal questions were now by arrangement argued before taking the other matters in the causes, as a decision in one particular way of these two questions would render the discussion of some of the other questions unnecessary.

Dr. *Cochrane* was a Scotchman by birth. In 1780, being then twenty-six, he entered the *East India Company's* medical service and proceeded to *India*, where he resided till 1819, when he came home. In *India* he had cohabited with a native Indian lady, and had by

particular school in *Switzerland*, went to live in *Switzerland*; shortly afterwards he withdrew his sons, and went with his family to *Paris*, where he lived for five years, living in apartments taken for a lease and furnished by himself. He died in *France*. The evidence as to his intending to return to *Scotland* was conflicting; the principal evidence in favour of such intention, was that he kept up his Scotch property, and by correspondence directed the management of it with great minuteness.

her one daughter, now Mrs. *Moorhouse*, born in 1807. In one of the suits, *Moorhouse v. Colvin*, it was insisted that in 1790 a marriage according to the rites and laws of that part of *India* where Dr. *Cochrane* and the Indian lady resided had taken place between Dr. *Cochrane* and her, and whether such a marriage had taken place was one of the questions argued. As this question turned entirely on evidence and involved no material point of law, the facts and the arguments and judgment upon it are not here reported.

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The other question was what was Dr. *Cochrane's* domicile at the date of his death? Dr. *Cochrane* had in November, 1808, married an English lady in *India*, and of that marriage there was issue two sons. In 1829, Dr. *Cochrane*, being then resident in *France*, executed an instrument of trust in the Scotch form operating as a will, and a question was raised on this, whether the residuary gift was not void. He had previously, when in *India*, made a will in English form, by which he gave certain benefits to Mrs. *Moorhouse*. The grounds of the contest as to the testator's domicile it is not necessary to state in detail; the broad result was that the Plaintiff in *Lord v. Colvin*, claiming through the testator's son, was interested in establishing a Scotch domicile; while Mr. and Mrs. *Moorhouse*, in *Moorhouse v. Colvin*, were interested in establishing a French domicile, as Mrs. *Moorhouse*, if illegitimate, claimed under the French law a share of undisposed residue.

In a previous stage of the cause Mr. and Mrs. *Moorhouse* had given evidence tending to establish a Scotch domicile. They now tendered evidence tending to support a French domicile.

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The judgment proceeded entirely on the question of domicile, subsidiary questions remaining to be argued, and all the facts are fully set forth in the judgment.

Sir *R. Bethell*, Mr. *Anderson*, Mr. *E. F. Smith* and Mr. *G. M. Giffard* appeared for the Plaintiff.

The Attorney-General (Sir *Fitzroy Kelly*), Mr. *Rolt*, Mr. *Glasse* and Mr. *Welford*, were for Mr. and Mrs. *Moorhouse*.

The Solicitor-General (Sir *Hugh Cairns*), Mr. *W. Morris* and Mr. *Jackson* for the representatives of the testator.

Mr. *Bailey*, Mr. *G. L. Russell* and Mr. *Roxburgh* for the Scotch next of kin.

Mr. *C. P. Cooper*, Mr. *Shapter*, Mr. *C. Hall*, Mr. *C. Roupell*, Mr. *R. W. Moore*, Mr. *Wakefield*, Mr. *Mackeson*, Mr. *Erskine* and Mr. *Parke* for other parties.

The following cases were cited: *Murray v. Grant* (a); *Whitelocke v. Baker* (b); *Story's Conflict* (c); *Hamilton v. Hamilton* (d); *Forbes v. Forbes* (e); *Douglas v. Monro* (f); *Pothier* (g); *Munro v. Munro* (h); *Moorhouse v. Colvin* (i); *Whicker v. Hume* (k).

14 Feb. 1859.
 Judgment.

The VICE-CHANCELLOR stated the nature of the suits and that two preliminary questions had now to be

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| (a) 1 Macq. 117, n. | (g) Edit. 1845, p. 3, Introd. |
| (b) 13 Ves. 512. | 20—59. |
| (c) Sect. 44. | (h) 7 Cl. & Fin. 877. |
| (d) 1 Bell, App. Cas. 736. | (i) 15 Beav. 341. |
| (e) Kay, 341. | (k) 13 Beav. 366; 1 De G. |
| (f) 5 Madd. 379. | M. & G. 506. |

decided. Firstly, whether there was any marriage between Dr. *Cochrane* and the Indian lady; and secondly, what was the domicile of Dr. *Cochrane* at the time of his death? And his Honor held that there was no sufficient evidence of such marriage and that Mrs. *Moorhouse* was illegitimate. He then proceeded on the question of domicile as follows :—

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In the Spring of 1819 Dr. *Cochrane* with his family arrived in *England* on his return from *India*, having amassed a large fortune in that country. His family consisted of himself, his wife and two sons, *Peter* the eldest, born 18th December, 1811, and *John* the youngest, born 12th September, 1813. His domicile of origin was Scotch. He was the proprietor of a small estate in *Renfrewshire* in *Scotland* called *Clippens*, consisting of about sixty Scotch acres, viz.: twenty of ploughable land and forty of wood and unreclaimed moss, with an old house of small size.

This estate had been the property of his ancestors for about 200 years and was his own birth-place. He had bought it about 1789, when in *India*, from the trustees for his father's creditors, and had before his return from *India* caused a new house to be built upon it, larger than the old one, but still of moderate dimensions. The old house was still left standing at the time of his return from *India*. *Clippens* was occupied by his sister Mrs. *M'Farlane*, a widow.

In the course of 1819 Dr. *Cochrane* visited *Clippens*, and passed that Summer in a tour in the north of *Scotland* and the winter in *Edinburgh*.

In June, 1820, he took up his abode at *Clippens*,

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where he continued to reside till May, 1825, with occasional absences at *Edinburgh*.

From very nearly the commencement of that period till the end of it, the boys had a tutor residing in the family, the Rev. *John Birkmyre*, afterwards D.D. and minister of the *Dean Church, Edinburgh*.


In each of the five years of the period above mentioned the family made a visit to *Edinburgh* and on one or two of those occasions remained there for some months. But these occasional absences did not prevent *Clippens* from being their home. And there can be no doubt that from the time of his arrival in *Scotland* from *India* up to May, 1825, the domicile of Dr. *Cochrane* was Scotch, which was his domicile of origin and which (assuming it to have been previously changed to an Anglo-Indian domicile by reason of his long residence in *India* in the company's service) reverted upon his taking up his abode at *Clippens* in June, 1820.

In May, 1825, Dr. *Cochrane*, with his family, left *Clippens* and proceeded to the Continent. From that time neither he nor any of his family ever during the remainder of his life returned to reside at *Clippens*, not even to sleep there for a single night. Nor did they during that period even return to *Scotland* except for a short visit in 1829, after mentioned.

The question is whether in or subsequently to May, 1825, Dr. *Cochrane* abandoned his Scotch domicile and acquired a domicile in *France*, in which country he resided for the five years next preceding his death.

I shall begin by simply tracing the movements of Dr.

Cochrane from his departure from *Clippens* to the day of his death.

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He left *Clippens* on 18th May, 1825, on his way to *Switzerland* and arrived at *Berne* on 30th September following, having in the interval stayed about three months in *London* and about three weeks at *Paris*. His object in going to *Berne* was to place his two boys at the school of the celebrated *Fellenberg* at *Hofwyl*, in the immediate vicinity of *Berne*. Accordingly immediately after their arrival the boys were placed at Mr. *Fellenberg's*, the Dr. and Mrs. *Cochrane* remaining at *Berne*, except perhaps for some short excursions.

Scarcely six months however had elapsed before Dr. *Cochrane* "having found very substantial reasons for disapproving both the personal conduct and the system of education of Mr. *Fellenberg*," resolved to remove the boys altogether from his institution, which he accordingly did on 2nd April, 1826, and on the 6th May following Dr. *Cochrane* with his family quitted *Berne* for *Paris*, where they arrived on 17th May, 1826; and from that day till the day of Dr. *Cochrane's* death, which happened on 18th June, 1831, a period rather exceeding five years, they continued to reside at *Paris*, with only such short occasional absences as I am about to mention.

In each of the five years of the residence at *Paris*, Dr. *Cochrane* and his family made an excursion to some bathing place on the French coast, *Dieppe* or *Boulogne*, returning on each occasion to their abode at *Paris*.

Early in July, 1829, Dr. *Cochrane* with his wife and two sons left *Paris* for *Scotland* viâ *Boulogne*. They

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arrived in *London* on the 21st July. They remained there a month. On the 21st August they left *London* for *Glasgow*. At that time it must have taken them several days, probably a week at least, to get to *Glasgow*, so that I think they could not have arrived at *Glasgow* till towards the end of *August*. They stayed at *Glasgow* at an hotel three or four weeks, in which time Dr. *Cochrane* went over two or three times a week to *Clippens*, but none of them stayed a single night there. About 20th September Dr. *Cochrane* and the family left *Glasgow* on their way back to *Paris*. They stayed some weeks at *Edinburgh* and arrived at *Paris* on the 6th of November.

In April, 1830, Mr. and Mrs. *Moorhouse* came to *Paris* on a visit to Dr. and Mrs. *Cochrane* and stayed with them till near the end of July, when they returned to *England*.

On the 2nd November, 1830, *Peter*, the eldest son, being then under the age of nineteen, married clandestinely *Eleanor Fuller*, who was lady's maid to his aunt Mrs. *Baker*.

On the 18th June, 1831, Dr. *Cochrane* with his wife and two sons left *Paris* for *Boulogne*. Being in a declining state of health he was accompanied by a medical gentleman named *Young*. On the first evening they arrived at *Beauvais*, and that same night Dr. *Cochrane* died. I have said that Dr. *Cochrane* was then on his way to *Boulogne*: whether he intended to stop there or to cross over to *England* does not appear distinctly from the evidence. An impression prevailed with some that he was coming over for the purpose of altering his will to the prejudice of his eldest son *Peter*, with whom he

was of course much displeased on account of his marriage, and that was certainly *Peter's* own belief.

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These are the material events which occurred between the 18th May, 1825, when Dr. *Cochrane* and his family left *Clippens*, and the 18th June, 1831, the day of his death.

The question then is, whether Dr. *Cochrane* had lost his Scotch and acquired a French domicile?

It is not my intention to enter upon an elaborate discussion of the various definitions which have been given, or attempted to be given, of the term "domicile;" at the same time it is impossible to avoid some reference to them. I concur in the observations of Lord *Cranworth* in *Whicker v. Hume*, that many of them are rather illustrations than definitions. Some of them also appear to me objectionable because they are expressed in language more or less figurative, which ought never to be the case with what professes to be a definition. Some of the Roman definitions are utterly inapplicable to the present condition and habits of mankind. The Roman definition most frequently cited is this:—" *In eodem loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum summam constituit; unde rursus non sit discessurus, si nihil avocet; unde cum profectus est, peregrinari videtur; quod si rediit, peregrinari jam destitit.*" I confess it has always appeared to me that this sentence is more to be admired for the neatness of its Latinity than for its merits as a legal definition. It seems to me to be open to the objection of being (at least in the first branch of the sentence) expressed in figurative language. Moreover it depends upon the manner in which it is translated,


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whether it accords with the decisions of our Courts ; and I know no Latin sentence more difficult to translate ; almost every important word presents some difficulty. "*Larem*," which even to a Roman was a figurative expression, may be properly translated "household," meaning by that term the united body, consisting of a man and his wife and children and domestics dwelling together in one abode. "*Larem*" does not signify the *place* of abode. The words are "*in eodem loco ubi quis larem constituit*," i.e. a man has his domicile in that *place* where he has established his "*larem*." The word must mean, not the *place* of residence, but the body which resides there ; or perhaps more correctly, the act of co-residence as members of the same family. It is not easy to suggest a translation of the words "*rerum ac fortunarum summam*," which shall be faithful to the original, and at the same time convey to the mind a precise and definite idea. "*Res*" probably here signifies "business ;" "*fortuna*" no doubt means "possessions" or "property ;" but what does "*summa*" mean ? The proper meaning of the word is "the sum or aggregate ;" but it is perhaps here used to signify "the chief or principal part or bulk." Mr. Justice *Story* evidently felt the difficulty of rendering this branch of the sentence into English ; and in order to give something intelligible he has sacrificed accuracy of translation ; he renders it thus, "There is no doubt that every person has his domicile in that place which he makes his family residence and principal place of his business." This is obviously rather a paraphrase than a translation. Again the term "*peregrinari*" in the last branch of the sentence requires a particular translation to make the definition agree with the decisions of our Courts ; the word properly means "to be in a foreign country ;" but if it is so translated, it militates with the proposi-

tion now well established; that a man may establish a domicile in a foreign country and in which he still continues to be a foreigner. The word "*peregrinari*" must therefore be translated "to be a wanderer," viz. from home, and so Mr. Justice *Story* translates it. Therefore, if this celebrated passage from the Roman law is to be used as a definition by which our Courts of Justice are to be guided, I think it must be translated in some such form as this:—"There is no doubt that every person has his domicile in that place where he has established his household and the chief part or bulk of his business and of his property; from which he is not intending to depart if nothing calls him away; from which when he goes away he seems to be wandering from home, and when he has returned he has ceased to be wandering." Thus translated the sentence may not perhaps be objected to on the score of inaccuracy, though it is still open to the observation that a man may have his family residence (his "*larem*") in one country and the chief part or bulk of his property and even the chief part or bulk of his business ("*rerum ac fortunarum summam*") in another.

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Voet's definition seems to me as little open to objection as any:—" *Proprie dictum domicilium est, quod quis sibi constituit animo inde non decedendi si non aliud avocet.*" *Vattel* defines domicile to be a fixed residence in any place, with an intention of *always* staying there. Upon which Mr. Justice *Story* justly remarks, "This not an accurate statement. It would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom." I would observe however that this emendation of Mr. Justice *Story*, though a decided improvement upon *Vattel*,

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would not perhaps quite agree with the decisions of the English Courts, with respect to Scotchmen going to *India* in the service of the *East India* Company. They have been held to acquire an Anglo-Indian domicile; and yet ninety-nine out of every hundred servants of the Company when they go out to *India*, and while they remain there, entertain and are continually declaring a settled and abiding purpose and intention to return home as soon as they can accumulate a sufficient fortune. I would venture to suggest that the definition of an acquired domicile might stand thus:—"That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home."

I am disposed to think that the definition thus modified would be found to be in accordance with most, if not all, of the leading decisions on the subject of acquired domicile.

But whatever may be the most correct and proper terms in which to frame a definition of domicile, this at least is clear and beyond controversy, that to constitute an acquired domicile two things are requisite, act and intention, *factum et animus*. To use the language of the eminent American jurist, to whose admirable writings I have before referred, "Two things must concur to constitute domicile (of course he is speaking of acquired domicile): first, residence; and secondly, the intention of making it the home of the party." There must be the fact and the intent; for, as *Pothier* has truly

observed, a person cannot establish a domicile in a place, except it be *animo et facto*.

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Now in the case of Dr. *Cochrane*, with respect to the *factum*, there is no doubt whatever. It is certain that for full five years next preceding his death he resided in *France*. During the whole of that time he dwelt with his wife and family at *Paris*, never quitting it except occasionally for special temporary purposes, on each of which occasions he quitted it with the intention of speedily returning to it, which intention was always fulfilled, except on the last occasion when death overtook him at the end of the first day's journey from his dwelling.

So far as relates to the *factum* of residence there was undoubtedly such a residence in *France* as would be amply sufficient for the constitution of a French domicile.

It remains then to consider what was the *animus*, the intent of Dr. *Cochrane* with respect to this residence in *France*. And this must be ascertained by a minute examination of the circumstances, the condition, and the conduct of Dr. *Cochrane* and the expressions used by him both in writing and verbally. The evidence on these points lies scattered through an immense mass of depositions and of documents, requiring a laborious, minute, careful and often repeated perusal and examination in order to collect and arrange the facts and circumstances, and to appreciate duly their bearing on each other and on the whole question. I will endeavour to review them with some degree of arrangement and as succinctly as the case admits. In so doing I shall have to refer to some facts of so minute and apparently




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trivial a character, that they might seem unworthy of judicial cognizance. But upon a question of domicile, there is no fact or circumstance, however minute or trivial in itself, which may not be of importance for ascertaining the purpose and intention of the party. Indeed sometimes the very minuteness and triviality of an act or expression may render it a safer guide in seeking after the intention than matters of a more formal character. Now it strikes me in the outset that there are some particulars to be noticed in the circumstances and condition of Dr. *Cochrane*, the tendency of which is strong towards the opinion that he was not likely to intend to establish a permanent abode in a foreign country. He and all his ancestors were Scotch; for some 200 years the family had been settled at *Clippens*, which, though but a small estate, made the owner a landed proprietor or Laird. He was himself born at *Clippens* in the old house, which he did not cause to be pulled down when he built a new one, and which, with reference to old associations, he constantly refused to pull down when urged by his friends to do so. He had not, indeed, actually inherited the property; for while in *India* he had bought it from the trustees for his father's creditors, and indeed his letters written at the time seem to me to indicate that he made the purchase with some reluctance; but I think that the evidence tends decidedly to show that at least after he came to reside at *Clippens*, he felt a great interest in the place and even a strong attachment to it. He had returned from *India* with a large fortune, and had laid out money in improving the premises. As he was by no means without family pride, so also he (as well as his wife) was not altogether free from a love of ostentation and display, although he was not so much influenced by these tendencies as to prevent his being a man of strong good

sense. His great passion was a love for horses. He had brought over some Arab horses from *India*, from which he bred; and it seems to me from his letters, and indeed from other parts of the evidence, that nothing occupied so much of his time and attention as the increase and improvement of his stud. In connection with this pursuit he had in or about 1821 built at considerable expence a spacious riding school at *Clippens*, as well as new stables. His love of animals was not confined to horses; his poultry yard seems to have been an object of his attention, and was numerously stocked with native and foreign breeds; he had a great regard for the pigeons in his dovecote, waging a fierce war with their destroyers, the owls; and even the rooks that frequented the premises found in him a protector against the fowling pieces of the neighbours. All these tastes and tendencies might obviously be more easily and freely indulged and enjoyed by continuing to reside at *Clippens* than by going to reside at any place on the Continent. In short, from these considerations it appears to me that *primâ facie* at least it would be justly considered very improbable that Dr. *Cochrane* should at any time entertain an intention of establishing his permanent abode in *France*, or indeed at any other place than *Clippens*. If he at any time formed such an intention, it must have been under the operation and influence of some motive or motives of no trifling cogency.

Let me now inquire what were the motives which induced Dr. *Cochrane* to leave *Clippens* in May, 1825.

Three motives have been assigned for Dr. *Cochrane* leaving *Clippens*.

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1. A desire to educate his two sons at *Hofwyl*, in *Switzerland*.

2. His displeasure with his neighbours by reason of his being (as he thought) unjustly assessed for parochial charges.

3. His finding his neighbours avoiding the society of his family by reason of rumours as to impropriety of conduct on the part of Mrs. *Cochrane*.

1. As to the first of these three suggested motives there can be no doubt that Dr. *Cochrane* did desire to educate his sons at *Fellenberg's*, at *Hofwyl*, near *Berne*, in *Switzerland*. Mr. *Birkmyre* (the tutor) says that a young man who had been educated there having come to *Clippens*, Dr. *Cochrane* was much pleased with him, and asked Mr. *Birkmyre* to give him some information respecting the establishment at *Hofwyl*; that Mr. *Birkmyre* accordingly procured a number of the *Edinburgh Review*, which contained an article on the subject of *Fellenberg's* system of education, and gave it to Dr. *Cochrane*; that this was within a year of the family leaving *Clippens*; that Dr. *Cochrane* appeared pleased with the system, and that in this he was particularly urged by Mrs. *Cochrane*; and that he appeared particularly anxious to get away to *Hofwyl*. And *Crow* the gardener says that Dr. *Cochrane* told him his reason for leaving *Clippens* was that he desired to place his two boys at school at *Berne*, in *Switzerland*, for education, and that Mrs. *Cochrane* was anxious to be near them at first. I have no doubt that this was at least one of the motives which induced Dr. *Cochrane* to leave *Clippens*. And accordingly having quitted *Clippens* on 18 May, 1825, and having staid in *London* till the 23rd August, the family went (*viâ Paris*) to *Berne*, where they arrived the 30th of September, 1825, and

the boys were thereupon placed under *Fellenberg* at *Hofwyl*.

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2. With respect to the second motive assigned, it appears from the evidence that the assessors for the parish or district in which *Clippens* was situate did assess Dr. *Cochrane* on his property in a manner which he thought unjust, by assessing his property not only at *Clippens* but elsewhere; and that he resisted the assessment; that there was litigation on the subject between Dr. *Cochrane* and the heritors of the parish of *Kilbarchan*, and that he was much displeased and annoyed at the decision being against him. Some of the witnesses consider this to have been the reason or one of the reasons which induced Dr. *Cochrane* to leave *Clippens*. And though I do not think that this would of itself have been sufficient to induce him to go away, I think that it probably had some influence in determining him in conjunction with other motives. And certainly I find that in a letter to *Crow* of 19 April, 1826, he expresses some satisfaction in the thought that he had, by leaving *Clippens*, baffled his neighbours about the poor rate. He says, "I suppose he (Sir *W. N.*) is grated at my having eluded by my absence the payment of the poor rates he was so zealous and active in getting imposed on me."

In connection with this source of dissatisfaction with his neighbours, I may mention another of a somewhat similar description. Captain *Stirling*, one of his neighbours, states in his deposition, that during Dr. *Cochrane's* residence at *Clippens* the road trustees put up a catch bar on the road leading from *Clippens* to *Johnstone* and *Paisley*, within about 500 yards of Dr. *Cochrane's* gate. This is alluded to in some parts of

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the evidence as a cause of annoyance to Dr. *Cochrane*. Captain *Stirling* says that Sir *William Napier* of *Millihens* (which was about a mile and a half from *Clippens*) was the managing trustee of the roads of the district. And referring to Dr. *Cochrane's* letters to *Crow*, I find that they contain many expressions of bitter hostility against Sir *William*.

3. With respect to the third reason suggested, I draw from the evidence the following conclusions of fact. There was a groom at *Clippens* named *Daniel Pearson*, who must have been with them from the time when they first went there. This man was certainly treated by Mrs. *Cochrane* with a degree of freedom and familiarity altogether unusual and unbecoming. I do not intend to discuss the question whether the evidence is sufficient to justify the conclusion that the intercourse between them was carried to the extremity of guilt; it is sufficient to say that it was such as to attract the observation not only of every one in and about the house, including Dr. *Cochrane's* sister Mrs. *M'Farlane*, the tutor, the female companion of Mrs. *Cochrane*, the servants, the work people, and even the boys, young as they were, but also of the neighbours around, both of the humbler and of the higher classes, and to cause remarks and rumours highly derogatory to the character of Mrs. *Cochrane*. People of ruder and coarser habits were accustomed to call *Pearson* by the name of *Bergami*, the significancy of which appellation those who remember what is called the trial of Queen *Caroline* in 1820 will be at no loss to apprehend, and this name was sometimes shouted after them by the boys and rabble as they rode through the street of the neighbouring town or village. Nay more, so serious did this matter appear in the eyes of Mr.

*Birkmyre*, the boys' tutor, that he thought it right, at the instigation of Mrs. *M'Farlane* (Dr. *Cochrane's* sister) who lived in the house, to mention the subject to Mrs. *Cochrane* herself, and to recommend her to alter her conduct with respect to *Pearson*; this, for a short time, produced some effect on Mrs. *Cochrane's* conduct, but for a short time only. The effect of Mrs. *Cochrane's* conduct, and of the rumours and remarks to which it gave rise, was (as might naturally be expected) that the gentry of the neighbourhood, and of course more especially those families in which there were ladies, gradually sloped off from the accustomed neighbourly intercourse with the *Cochranes*, till at last the family at *Clippens* was left in a state of almost complete social isolation. These facts appear to me to be proved beyond all question. It is true that several witnesses have been examined on behalf of the Defendants the *Ferriers*, who depose that they were inhabitants of the neighbouring village of *Kilbarchan*, and that they were not aware of the rumours respecting the conduct of Mrs. *Cochrane* with the groom, and that they never saw Dr. and Mrs. *Cochrane* treated by the people of the village otherwise than with respect; and Lieut. *Douglas*, who was frequently at *Clippens* in 1822, and staid there on one occasion for two or three weeks, says he neither observed any impropriety, nor heard any rumours. But their testimony is quite insufficient to countervail the overwhelming evidence on the other side. The facts are proved not only by *Robert Shields* the carter at *Clippens*, *Margaret Brock* the dairymaid, and *Peter Adamson* and *William M'Nabb* the grooms, but by *George Crow* the gardener (who was high in Dr. *Cochrane's* confidence till his death), by the Reverend *John Alexander* (formerly a mason working often at *Clippens*), by *James Grant* the miller, by *William Lockhead*, a neighbouring

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farmer (also much trusted by Dr. *Cochrane*), by Mr. *Birkmyre* the tutor, and by *Jane Henderson* (then Miss *Robartson*) who lived with the family as companion to Mrs. *Cochrane*. Mr. *Scott* the banker at *Paisley* had heard the rumours, and so had Mr. *Fulton*, Mr. *Brown*, and Capt. *James Sterling*, R.N., of *Glentyre*. And these several witnesses prove beyond doubt the effect of these rumours on the neighbouring gentry.

Now it is impossible to doubt what must have been the effect of this state of things upon Dr. and Mrs. *Cochrane*. Upon Mrs. *Cochrane* (however she might be disposed to harden herself against public opinion) the effect must have been to produce great irritation and displeasure against the neighbours of all classes, and a strong feeling of aversion to the place as a residence. With respect to Dr. *Cochrane*, Mr. *Birkmyre* represents him (probably with much justice) as a man who did not view these matters as other persons would, and that any *faux pas* of that description, such as was imputed to Mrs. *Cochrane*, he would treat in a sneering manner, as a thing of little or no moment. Still the position in which Dr. *Cochrane* found himself placed with respect to the neighbours must have been to him a source of very great vexation and annoyance, and must have had a strong tendency to generate in his mind a desire to quit a neighbourhood where his wife was shunned by the high and insulted by the low, whatever attachment he may have felt for *Clippens* on other grounds. And if we even attribute to him such a share of philosophy, whether cynical or stoical, as to render him more callous than the majority of men would be to the vexations arising from such a state of things, so far as they concerned himself, we may be sure of this, that his own feelings and inclinations with respect to quitting

or remaining at *Clippens*, as indeed with respect to any other domestic question, would be powerfully influenced and guided by those of Mrs. *Cochrane*, who appears from the evidence to have possessed great influence over her husband. It would be impossible not to arrive at these conclusions even independently of any direct evidence as to the effect of this state of things on the minds of Dr. and Mrs. *Cochrane*. But such direct evidence is not wanting,—I refer to that of *M'Nabb* the groom, *Dick* the upholsterer, and of Captain *Sterling*. I cannot therefore help coming to the conclusion that the state of things brought about by Mrs. *Cochrane's* unbecoming conduct with respect to the groom was at least one of the causes, and as I think a principal cause, of the determination arrived at in the Spring of 1825 to depart from *Clippens*.

Having stated my view of each of the three motives which have been assigned for Dr. *Cochrane* leaving *Clippens*, I may observe of them together, that as men's conduct is generally the result of mixed motives, and as it is often impossible to say what relative weight any one particular motive had in bringing the mind to a certain determination, so probably it was in the case of Dr. *Cochrane*. I think each of the three motives above mentioned had its degree of operation, though perhaps very unequally, and I cannot pretend to decide what precise degree of weight or effect any of them had as compared with any other. I cannot, however, help thinking, that the first of the three, viz., the desire of educating the boys at *Hofwyl*, had more influence with Dr. *Cochrane* than with his wife; and that the last of the three, viz., the consequences of Mrs. *Cochrane's* conduct with the groom, had more influence with Mrs. *Cochrane* than with her husband. Whether Dr. *Coch-*

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*rane*, if he had been entirely uninfluenced by his wife, would have come to the determination to leave *Clippens* may perhaps admit of doubt. *Crow*, in his deposition in 1844, says—"The testator (Dr. *Cochrane*) himself stated that he had no wish to leave *Scotland*, but it appeared to me that he yielded against his own inclination to Mrs. *Cochrane's* desire to go abroad." The statement of *Grant* the miller is this, "He said that Mrs. *Cochrane* wished to go away from *Clippens* and would not stop; that he did not wish to leave *Clippens*, but Mrs. *Cochrane* did." Mr. *Birkmyre*, the tutor, who had the best means of forming a correct judgment on the matter, in his deposition in 1844 says thus, "The ostensible reason of the said testator and his family leaving *Clippens* was to place his boys under the tuition of Mr. *Fellenberg*, at *Hofwyl*, in *Switzerland*; the impression on my mind was that Mrs. *Cochrane* was solicitous to leave *Clippens*, that she was not happy there, and in fact she induced the said testator to leave; I think, if left to himself, he would not have gone abroad." And yet the same witness examined in 1854 says, "Dr. *Cochrane* expressed to me that it was his wish to go to *Switzerland* to place the boys under Dr. *Fellenberg*; but I think that was a mere excuse, and that the real fact was he wanted to leave *Clippens*." And he adds that he thought if Dr. *Cochrane* was not under any foreign influence he would return; but that Mrs. *Cochrane* was unwilling that he should return.

One thing however is certain, viz.: that in assigning to their dependents or acquaintances a reason for leaving *Clippens*, neither Dr. *Cochrane* nor Mrs. *Cochrane* would ever mention the *last* of the three notices above mentioned. They were not perhaps very likely to

assign the second. But the first is the one which we should expect them to assign. And accordingly we find that reason assigned on several occasions.

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Before quitting the subject of the motives which induced Dr. *Cochrane* to leave *Clippens*, I must make one observation which I think it important to bear in mind. It is this:—The desire to educate the boys under Dr. *Fellenberg* at *Hofwyl* had reference to a special and temporary object, and would cease altogether to operate as a motive for remaining absent from *Clippens* so soon as that special object was accomplished or had failed; whereas the effect produced by Mrs. *Cochrane's* conduct with the groom upon the social position of Dr. *Cochrane* and his family at *Clippens* would operate not only as a motive for quitting that place, but would continue to operate more or less as a permanent motive to deter Dr. *Cochrane* and his wife and especially the latter, from desiring to return to *Clippens* as a place of residence. And this latter remark would also to some extent apply to the second of the motives above mentioned. I mean Dr. *Cochrane's* displeasure against his neighbours on account of the assessment and the toll bar.

Before leaving *Clippens* Dr. *Cochrane* gave instructions to *George Crow*, the gardener, to keep the garden in the same state of culture as it then was in, and to proceed with the improvements which had been commenced on it. *Crow* was to be allowed the produce of the garden, but he was not to turn it into a market-garden, but to keep it as a gentleman's garden; and he was to keep up the walks and pleasure grounds, and to apprise Mr. *Campbell*, the factor, of any repairs wanting about the house and premises. And *Crow* says, that


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the purport and effect of what Dr. *Cochrane* said to him was that he might be absent for three or four years.

On the 9th May, 1825, Dr. *Cochrane* sent a letter of instructions to Mr. *Campbell*, his factor, appointing him his agent in respect of the property at *Clippens*, and giving some detailed directions; but it does not appear to me that it contains any thing very material. On the 12th May, 1825, he sent a letter to Mr. *Campbell* in which he says, "You are aware that I have been assessed to the poor's rates in the annual sum of 25*l.*, in virtue of my having been a householder. But as I shall immediately cease to be so, that assessment must entirely cease *till I re-occupy the house.*" And on the 19th May he wrote to *Campbell* suggesting whether in order to avoid being assessed it was necessary to give notice to the assessors, and adding, "If you think this necessary, I beg you will inform them that my house of *Clippens* became empty yesterday morning the 18th of May, 1825."

When Dr. *Cochrane* was about to quit *Clippens* in May, 1825, he caused the furniture of the house to be carefully packed up, not packed as it would be for the mere purpose of protection from dirt or damage, but packed in such a manner as to be ready to be sent off on a journey at an hour's notice, so that nothing more would be necessary for its travelling than to place it in the carts. It took six weeks to pack it. The only exceptions to this were that a bed was left standing in one of the bed rooms, a large portrait of Dr. *Cochrane* in oil and four prints were left hanging on the walls; the chandelier was left hanging in the drawing room and some books, lamps, glass and china and the wine in the cellar remained unpacked. The plate was sent

to be taken care of by Mr. *Scott*, the banker, at *Paisley*, in three chests. The servants were all dismissed except the valet and lady's maid who accompanied the family to *London* and a coachman who was left to take care of the stud, and from the time of Dr. *Cochrane's* departure not a creature slept in the house, *i. e.* in the new house. *George Crow*, who had been the gardener during the whole period of the residence at *Clippens*, was left in charge of the premises subject to the superintendence of Mr. *Campbell*, the factor. He was not to be considered as Dr. *Cochrane's* servant, nor to receive any wages, but he was to have the produce of the garden and the use of a small piece of ground besides for potatoes and grass for a cow. The carriage horses as well as the cows were sold; but the other horses, *viz.*: an Arabian horse, two mares, both in foal, and a colt, were left under the charge of the coachman *John Macdonald* as well as the dogs, the poultry, the pigeons and the pet rabbits of the boys.

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The only evidence we have of any expressions used by Dr. *Cochrane* when he was about to leave *Clippens* with reference to his object in going away or the probable duration of his absence is the following: He mentioned to Mr. *Scott*, the banker, that the object of his going abroad was the education of his two sons. To *Crow*, the gardener, he stated that the reason for leaving *Clippens* was that he desired to place his two boys at school at *Berne*, in *Switzerland*, for education, and that Mrs. *Cochrane* was anxious to be near them at first. And *Crow* says that the purport and effect of what Dr. *Cochrane* said was that he might be absent for three or four years. To *Grant*, the miller, he said that it was not his will to leave *Clippens*, but that Mrs. *Cochrane* wished to leave it for some time. And he

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said he should not be long away. Mrs. *Moorhouse* says that her father informed her when he left *Scotland* for *Berne* that he intended to keep *Peter* and *John* at *Hofwyl* in *Switzerland* until they should be fit to enter *Cambridge*; and that in the meantime he should travel in different parts of *Switzerland* and *Italy*, paying occasional visits to his estate in *Scotland*, and that he should not have any permanent place of abode until he could place his sons at *Cambridge*, when he would return himself to *Scotland* to reside.

Upon the whole, up to the time when Dr. *Cochrane* quitted *Clippens* in May, 1825, the result of the evidence appears to me to be this :—

There existed in the mind of Dr. *Cochrane* certain strong motives which would tend to produce in him a great reluctance to leave *Clippens*, and which would naturally induce him to prefer *Clippens* to any other place as a residence, as a home, as a domicile, inasmuch as it was the seat of his ancestors, his own birthplace, his residence for the preceding five years, a spot upon the improvement of which he had laid out a good deal of money, a place where he could indulge and gratify his particular tastes and propensities, and to which he felt for all these reasons a strong attachment.

On the other hand there were other powerful motives operating in his mind, the tendency of which was in a contrary direction to that; the one special and temporary (I mean the wish to educate his sons at *Hofwyl*) which might indeed be sufficient to induce him to leave *Clippens* for a time, but which would cease to operate when the special purpose was at end. The other permanent and abiding (I mean the displeasure and dis-

gust against the neighbours, occasioned partly by what he considered their unjust treatment of him in the matter of the assessment and in the matter of the toll bar, but mainly by their avoiding intercourse with him and his family on account of Mrs. *Cochrane's* conduct), a motive which would not only lead to a desire to depart from *Clippens*, but would tend to produce a continuing disinclination to return thither. And whatever might have been the effect of these latter motives upon the mind of Dr. *Cochrane* if left to their own operation, it is clear that it would be aggravated and intensified by Mrs. *Cochrane's* influence. How far such influence, operating upon his own feelings of irritation and vexation may have had the effect of generating in his mind a preponderating desire to quit the place, so that he went not merely in submission to her desire, sacrificing his own will to hers, but in accordance with his own desire and will, it is impossible to ascertain. I think however that the evidence up to this point leads to the conclusion that he went rather to gratify his wife's wish than his own, that he anticipated an absence of some years, and that he contemplated the probability of his fixing his residence at some other place for so long a time as might make it worth his while to remove all his furniture from *Clippens* to such new residence; but that he still looked forward to a return to *Clippens* as a residence at some future time.

It remains to consider what took place from the time when Dr. *Cochrane* with his family arrived at *Paris* from *Berne* on 17th May, 1826.

This question here presents itself: As the special object of educating the boys at *Hofwyl* had ceased, why did not Dr. *Cochrane* return to his home at *Clippens*, I

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do not say immediately, but at least after some weeks or months spent in participating in the gaieties and amusements and visiting the objects of curiosity and interest to be found at *Paris*? Why did he continue to reside with his family at *Paris* for upwards of five years, in fact until death overtook him? I have already adverted to the motives which may be assumed to have resulted from displeasure with his neighbours for the reasons before mentioned. But was there any other motive in operation which induced him to continue his residence at *Paris*? Was it for the education of his sons? There is no evidence of anything having been said or done by Dr. *Cochrane* previously to his leaving *Clippens*, from which it could be inferred that up to that time Dr. *Cochrane* entertained any predilection in favour of a foreign education in general for his sons; all that he seems to have then desired on the subject was that they should be educated at *Hofwyl* under *Fellenberg*, with a special view to his peculiar system of education. It may have been, however, that after his disappointment with respect to the system of *Hofwyl*, he formed the design of giving his sons a foreign education under other auspices. He may have adopted the opinion (which some have entertained) that the sort of education to be found on the Continent was more desirable for his boys than that which is usual in *England* or *Scotland*. Are there any grounds for concluding that such was the case, and that the education of his sons was the motive, or one of the motives, which induced him to take up or to continue his residence at *Paris*? If I were to form a judgment only from the unsettled, disjointed, unsystematic course of education which was actually pursued from the time of the arrival at *Paris* till the death of Dr. *Cochrane*, I should certainly have drawn the inference that the educating the sons abroad, instead

of being the motive which induced him to reside in *France*, was rather the result and consequence of that residence; and that having resolved for other reasons to reside in *France*, he made shift to procure for them such education as circumstances permitted. At the time of the arrival in *Paris*, in *May*, 1826, *Peter* was between fourteen and fifteen years of age, and *John* between twelve and thirteen. They were at first placed under the Rev. Mr. *Bevan* at *Choisi-de-Roy*, near *Paris*, who took a few pupils to prepare them for the University. Thence they were removed about *September*, 1827 (as Mr. *Bevan* says at his own request), and placed as parlour-boarders with the *Abbe Langan*, the Principal of the College at *Dieppe*.

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In the Spring of 1828, the *Abbe Langan* removed from *Dieppe* to *Passy* near *Paris*, and the boys were continued under him at that place till about the Summer of 1829. In July, of that year they accompanied their parents on the visit to *Scotland* already mentioned; and it appears from a letter to *Crow*, of 9th June, 1829, coupled with Mr. *Birkmyre's* evidence, that on that occasion they were accompanied by a French tutor, whose name does not appear. They did not return to *Paris* till November, 1829, and early in 1830 the boys were placed under Mr. *Houseall*, at the *Boulevard Mont Parnasse* at *Paris*; but at the end of six months they were removed at that gentleman's request, because he apprehended the effects of their bad habits on his other pupils. They were then sent to a college in the *Faubourg St. Honoré* at *Paris*. In July, 1830, *Peter* the eldest was sent over to *England* with his relations, the *Babers*, with a view to his being placed in some institution for obtaining a military education; and about that time *John* was placed under a Mr. *Phillips*,

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at *St. Germain-en-Laye*. *Peter* returned to *Paris* about December, 1830, having in the meantime married Mrs. *Baber's* maid. Whether he got any military education in *England* does not appear. On his return he was placed with *John* under Mr. *Phillips*, who had removed to *Passy*. The result of such a course of education was, as might be expected, most deplorable. And it was made still worse by the foolish indulgence with which the boys were treated. The *Abbé Langan* speaks in strong terms of the effect produced. It is difficult to imagine that Dr. *Cochrane*, who was undoubtedly a shrewd sensible man, could have deliberately adopted such a course of education, as thinking it the best for his boys, so that the attainment of it could form a motive for living away from his own country and his own property. And yet there is some evidence tending to show that Dr. *Cochrane* did (to some extent) entertain the wish to educate his sons abroad, and that the attainment of this object was at least one of the motives which induced him to continue his residence at *Paris*. Mr. *Ludovic Houston*, who was at *Paris* in 1828, and again in 1830, in his deposition taken in 1844 mentions his impression that he (Dr. *Cochrane*) was abroad for his amusement, and "*perhaps for the education of his sons.*"

Dr. *O'Grady*, in his depositions taken in 1845, says that he entertained a similar impression. These, however, are but impressions, and therefore cannot have any weight as evidence. There is, however, a letter from *Daniel Pearson* from *Paris*, to Mrs. *Cochrane* at *Berne*, dated 9th April, 1826, which is an answer to a letter from Mrs. *Cochrane* to him, dated 31st March, *i. e.* two days before the boys were actually removed from *Hofwyl*, and when of course their removal was in

contemplation. It appears from *Pearson's* letter, that in *Mrs. Cochrane's* letter, to which it is an answer, she had desired him to procure and send to her the prospectus of a certain school or college in *France*, which was understood to provide a most extensive education and to be conducted on the best principles, and which *Dr. Cochrane* had much approved of. *Pearson's* letter answers her inquiries; and that letter, though written to *Mrs. Cochrane*, is addressed on the outside to *Dr. Cochrane* (*Mons. Cochrane, à Berne en Suisse*), so that it was in truth a communication to both *Dr. and Mrs. Cochrane*. This shows that in the act of removing their sons from *Hofwyl*, *Dr. and Mrs. Cochrane* had it in contemplation to place them at some school or place of education in *France*. Furthermore, *Michel Aristide Vezard*, a grocer and pastry-cook in the *Rue de la Paix* at *Paris*, whose shop was frequented by *Mrs. Cochrane*, says that at one of her earliest visits to the shop *Mrs. Cochrane* told him that she had come to fix herself in *France* and educate her sons. On the other hand, however, *Madame Vezard*, that witness's wife, who, as he says, was present on every occasion when *Mrs. Cochrane* conversed with him, says that *Mrs. Cochrane* never said anything to her about the education of her children. But the most decisive evidence on the subject is that of *Mr. and Mrs. Moorhouse* themselves. They were examined in 1845 on the inquiry as to domicile, and this is their evidence. It will be recollected that in April, 1830, *Mr. and Mrs. Moorhouse* went over to *Paris* on a visit to *Dr. and Mrs. Cochrane*, and stayed with them for about three months, living in their house the greater part of the time. In answer to the eighth interrogatory *Mr. Moorhouse* says, "I had several conversations with the said *Peter Coch-*

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rane the elder, on occasion of my visiting him in *Paris* in the year 1830, touching his intention to return to *Scotland*, and touching his intention to reside permanently in *Scotland*, and touching his residence at *Paris*." And then after detailing some things which *Dr. Cochrane* said, he proceeds thus: "He spoke to me constantly of *Scotland*, and in such a way as convinced me that his intention was to return there, and to make it his permanent place of abode; in fact he told me that such was his intention *when the education which he intended his sons to receive abroad* should have been finished. He told me that as soon as his son *John* was prepared to enter one of the English Universities, he should return to *England* with him, and after placing him at *Cambridge*, he should go himself to *Scotland* to reside; he intended his son *Peter* for the army after he had acquired a knowledge of the continental languages, which was the principal object he had in view in coming abroad." *Mrs. Moorhouse*, in answer to the eighth interrogatory, also says she had many conversations with her father whilst he resided at *Paris*, touching his intention to return to *Scotland*, and touching his intention to reside permanently in *Scotland*; and among other things she says, "He told me that he only came abroad for the purpose of getting his sons educated sufficiently to enable him to send them to *Cambridge*; that he should then return to *Scotland*, and that he hoped to live and die there." With such evidence as this, I feel it impossible not to come to the conclusion that *Dr. Cochrane* (whether prompted by his own individual opinion or influenced by the opinion and wish of his wife) did entertain the intention of educating his sons abroad, and that the accomplishment of that object did form at least one ingredient in the motives which induced him to continue to reside at *Paris*.

I must here observe further that Dr. and Mrs. *Cochrane* after they went to *Paris* appear to have contracted a taste for the habits of life prevailing in that capital and for the society to be found there; and that during the first three or four years of their sojourn there they received a good deal of company, giving fine dinners and other entertainments, though their society consisted chiefly of English and Scotch families. This taste may have formed some additional inducement to prolong their stay at *Paris*. But such motive could not have had much effect during the last year or two of their residence there, since it appears from the evidence that during this latter period, owing to the bad state of Mrs. *Cochrane's* health, and the advancing years and declining strength of Dr. *Cochrane*, they saw very little or no company. On the other hand, these same causes may have tended to make them averse to encounter the severer climate of *Scotland*.

Having thus mentioned the several motives which may have operated to induce Dr. *Cochrane* to continue his residence at *Paris*, I must now consider the acts and conduct of Dr. *Cochrane* from the time he went to *Paris* till his death, so far as they appear to throw any light on his intention.

The first fact deserving of notice is that from a very early period after his arrival at *Paris*, Dr. *Cochrane* adopted, and continued till his death, a plan and mode and style with respect to his abode and his establishment altogether unusual with persons intending only a temporary sojourn at *Paris*, and usual only with those who design a permanent or at least a prolonged residence there. Instead of occupying apartments in an hotel, or taking furnished lodgings, we find that within

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two months after his arrival at *Paris* he rented an unfurnished apartment (suite of rooms) at No. 11, *Boulevard des Capucines*, which he furnished; and these he continued to occupy till the beginning of 1830, when he removed to a more spacious and commodious apartment (suite of rooms) at No. 6, *Place Vendome*, which he took unfurnished, and which he furnished, and which continued to be the residence of himself and his family till his death. So that he occupied the first apartment for about three years and a half, and the second about one year and a half. It does not appear for what precise term he agreed to take the first apartment, but the tenancy was determinable on three months' notice, and the rent was 2,400 or 2,500 francs a year (about 100*l.* a year), payable quarterly. The apartment in *Place Vendome* was taken by Dr. *Cochrane* under a lease from Countess *Le Clerc* (who herself held as lessee from the owner), whereby she leased to Dr. and Mrs. *Cochrane* for one, two or three years, determinable at their respective choice at three months' notice, the apartment in question, described as being the first floor of No. 6, *Place Vendome*, with the stables and appurtenances, at the yearly rent of 7,000 francs (280*l.*) from 1st January, 1830. In both cases the tenant paid the direct taxes. Having regard to the habits prevailing in *France*, the mode of taking and furnishing both these apartments was equivalent to taking a lease of an unfurnished house in *London* and furnishing it. According to the description given by Monsieur *Proudhomme*, the owner of the house No. 6, *Place Vendome*, the apartment rented by Dr. *Cochrane* in that house consisted of ten rooms, besides the servants' rooms, kitchen and offices. On taking this apartment Dr. *Cochrane* at his own expense constructed a chimney in the back drawing-room in the place of a stove which before existed there, and also a

small oven in the kitchen. The furniture which Dr. *Cochrane* purchased for these two residences is variously described by the witnesses by the terms commodious, handsome, splendid, magnificent; and one of the witnesses in the fervour of her admiration, declares that it was equal to that in the king's palace. I think I may justly assume it to have been at least entirely commodious and handsome; and considering Dr. *Cochrane's* wealth, and the proved tendency to ostentation, at least of Mrs. *Cochrane*, it is not probable that it was otherwise than handsome and expensive. Mr. *Francis Langan* says the furniture in *Place Vendome* was excellent furniture, and that Dr. *Cochrane* had great pride in it. Dr. *O'Grady* says the rooms were magnificently furnished. *George Vacher*, the son of the upholsterer who supplied a portion, at least, of the furniture at both Dr. *Cochrane's* residences in *Paris* (he, the son, having himself accompanied the furniture on its delivery on the premises), says that it was splendid furniture. One item of ornamental furniture is mentioned by Monsieur *Sourian* the watchmaker, who says that among several clocks purchased by Dr. *Cochrane* was one for his saloon, the price of which was 1,400 francs. The establishment of servants, horses, carriages and other matters both of convenience and of luxury were in keeping with the position of a family thus located. The number of servants may have occasionally varied in some slight degree, but in general it seems by the evidence to have consisted of four or five men and three or four women. Latterly all the servants (or at least all but one) were French. The number of horses seems to have been never less than five or six (including four carriage horses), and sometimes the total number amounted to seven or eight. One witness says nine. Three carriages were kept. Several of the tradespeople

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who supplied the family with the usual articles of consumption have been examined, and from their evidence it appears that in respect to all such matters the course of dealing was entirely on the footing usual in the case of a family having a fixed and permanent abode at *Paris*, credit being given in a manner and to an extent altogether unusual with respect to an English family intending only a temporary residence. But these tradespeople form their judgment as to whether a person is a permanent or merely a temporary resident only from the fact of his living in a furnished apartment or hiring an unfurnished one and putting in his own furniture. In connection with the mention of the stable establishment, I may observe that in August, 1828, Dr. *Cochrane* caused to be sent over to him from *Clippens* two horses which he had bred there, and moreover in 1831, he had given directions for two more horses of his stud to be sent over from *Clippens*, but the execution of that design was prevented by his death.

Now all that I have mentioned respecting the plan and mode of residence and establishment adopted and maintained by Dr. *Cochrane*, in my opinion tends strongly to the inference that he intended a prolonged if not a permanent residence at *Paris*. And this strikes me very forcibly, that whatever weight is due to the argument derived from the circumstances attending Dr. *Cochrane's* residence at the *Boulevard des Capucines* as indicating an intention of prolonged residence in *France*, an argument of far greater force in favour of such intention is to be derived from the circumstances attending his change of residence to the *Place Vendome*, when we find, that after three years and a half's residence at the former place, being dissatisfied with the accommodation or the locality or the style of the apart-

ment he was living in, he thought fit to remove to a more spacious and fashionable and expensive dwelling, and to fit it up and furnish it at considerable expense.

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There are however three circumstances relating to the dwelling and establishment of Dr. *Cochrane* at *Paris*, which may be thought to have a contrary tendency and which therefore deserve notice. The first is the stipulation introduced into the leases or agreements under which Dr. *Cochrane* rented each of his two dwellings, making the tenancy determinable on three months' notice. This no doubt at first sight would seem to indicate that a speedy departure was in contemplation. But having regard to the political events which had taken place at *Paris* during the half century next preceding the time of which we are speaking, it would be most natural, and not inconsistent with an intention of prolonged or even permanent residence, that an Englishman should by such a stipulation provide for the chance of some political disturbance occurring which might render it expedient to quit the country suddenly. And accordingly Mr. *Beavan* (the boy's tutor) who had resided in *France* thirty-four or thirty-five years, says in his affidavit that it is the general and almost universal practice of Englishmen and other foreigners taking up their abode in *France*, and who take leases of their residences, to provide in such leases for the contingency of any cause for a hasty removal, by having inserted in such leases provisions for determining tenancies on three months' notice. And under the circumstances it does not appear to me that the making such a stipulation is necessarily inconsistent with an intention to reside permanently at *Paris*.

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The second circumstance deserving of notice is that although the furniture at *Clippens* had been packed up and made ready for removal at the shortest possible notice, Dr. *Cochrane* did not send for it, but allowed it to remain at *Clippens*, and incurred the expense of purchasing new furniture for the apartments he rented in *Paris*; from which it has been argued that Dr. *Cochrane* abstained from removing the furniture from *Clippens* in order that it might be ready for use there upon his return. It must however be recollected first that the furniture at *Clippens* was of inferior style and quality, and unworthy of the style of dwelling which Dr. *Cochrane* had adopted at *Paris*, as well as unsuited to Parisian ideas and tastes; and secondly, that the expense of the transport of it to *Paris*, together with the import duty, would probably have amounted to nearly as much as the cost of new furniture. And on the first head we have the evidence of *James Grieve* the upholsterer, who after Dr. *Cochrane's* death was employed to take the furniture from *Clippens* and put it up in Mrs. *Cochrane's* house in *Harley Street*, who says that the furniture was not very valuable; the dining room curtains were silk and worsted damask; and the whole of the drawing room furniture was imitation rosewood. And upon the second head we have the evidence of Mr. *Beaven* (the boy's tutor) who had very long resided at or near *Paris*, who says in his affidavit that the purchase of fashionable furniture at *Paris* would cost but very little more than the expenses (including the import duty) would amount to of bringing furniture from such a distance as *Clippens*, besides the consideration that English furniture would not be at all suitable to the style of Parisian apartments. It does not appear to me that the circumstance of Dr.

Cochrane having abstained from transporting the *Clip-pens* furniture to *Paris* is necessarily inconsistent with an intention to make the latter place his permanent residence.

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The third circumstance worthy of notice is somewhat of the same character as the last, I mean the fact that *Dr. Cochrane* did not think fit to have his plate brought to *Paris* from the custody of the *Paisley* bankers. It appears from the evidence of *Joseph Calumé*, who was butler and valet to *Dr. Cochrane* at the *Place Vendôme* for about a year previous to *Dr. Cochrane's* death, that *Dr. Cochrane* used English plated goods which he had brought over from *England* and not silver. *Mr. Francis Langan* indeed speaking of the residence of *Dr. Cochrane* at the *Boulevard des Capucines*, says he frequently dined with *Dr. Cochrane*, that he gave very fine dinners, and his table was groaning with plate. These two statements may perhaps be reconciled by supposing that *Dr. Cochrane* hired plate for the occasions of dinner parties, and used the plated goods for ordinary occasions. But however that may be, it appears to me that the fact is established that *Dr. Cochrane* abstained from bringing over his own plate from *Scotland*, and preferred purchasing plated goods in *England* for the use of his family at *Paris*. I do not think that his doing so can be altogether accounted for by considerations of the expense of transport, or the import duty which would be payable upon it in *France*. And I think the fact in question tends, so far as it goes, to negative the supposition that *Dr. Cochrane* intended to reside permanently in *France*, though I do not think the fact of any very great weight.

No account of *Dr. Cochrane's* proceedings at *Paris*

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would be complete which omitted to notice the circumstance of the continued intercourse of *Daniel Pearson* with the family, though I confess I do not think that this circumstance affords much argument to either party on the question of domicile. There is something very mysterious and inexplicable in the position in which this man stood with regard to Dr. and Mrs. *Cochrane*. He remained at *Clippens* till the departure of the family for the Continent. Mrs. *Henderson* deposes that while she was living with them at *Clippens*, Mrs. *Cochrane* offered to give him some money if Mrs. *Henderson* (then Miss *Robertson* would marry him,—a proposal which she (who was the daughter of a clergyman) rejected with disdain. When the family quitted *Clippens* he accompanied them and even travelled inside the carriage with Dr. and Mrs. *Cochrane*. From *London* he preceded them to *Paris*, where he remained during their sojourn at *Berne*, and occupied himself in procuring some education, especially in the French language. While Dr. and Mrs. *Cochrane* were at *Berne*, as well as at a subsequent period while they were at *Dieppe* in 1827, he corresponded with Mrs. *Cochrane*, not clandestinely, as far as I can judge, for his letters (at least several of them) were addressed on the outside to Dr. *Cochrane*. None of her letters to *Pearson* are in evidence, but several of his to her are produced. The tone of them is for the most part that of vulgar familiarity and sometimes almost of insolence, accompanied however in general by formal expressions of respect and deference. It appears from a letter he addressed to Dr. *Cochrane* in July, 1825, that Dr. *Cochrane* had then already (to use the language of the letter) lavished upon him numerous and almost unheard of acts of generosity. And it appears from another letter to Mrs. *Cochrane* in August, 1827, that Dr. *Cochrane* contemplated procur-

ing for him a commission in the army. He appears however to have established himself as a stock broker or stock jobber on the *Paris* Bourse; and during the whole time that Dr. *Cochrane* lived at *Paris* he was a constant visitor and guest at the house in the character of a friend, often accompanying Mrs. *Cochrane*, and sometimes Dr. *Cochrane*, in the carriage when they drove out to visit their sons at *Choisi-le-Roy* or *Passy*. He seems to have been high in the confidence and regard of Dr. *Cochrane* till his death, and is frequently mentioned by him in his letters to *Crow*. And after the death of Dr. *Cochrane* we find him in *London* keeping up the same familiar and constant intercourse with Mrs. *Cochrane* and her sons as before. I confess I am at a loss to account for this man's position in the family; for if his intimacy with Mrs. *Cochrane* is calculated to raise a strong suspicion of the existence of an adulterous intercourse it is to my mind perfectly inexplicable that he should have been for so many years not only tolerated but cherished as a friend and guest by Dr. *Cochrane* and his sons. If indeed we are to assume the alternative most unfavourable to Mrs. *Cochrane's* character, then indeed it may be suggested that this would be a sufficient reason why Mrs. *Cochrane* should desire to continue to reside at *Paris*, where she could gratify her guilty passion with less risk to her social position than in *England* or *Scotland*; for as Mr. *Bevan* observes in his evidence "These things are looked upon more lightly on the Continent than they are in a circumscribed society such as that in *Scotland*;" and "In *Paris*, if you give balls and dinner parties, they do not care who you are." And it seems from this same gentleman's evidence that even at *Paris* there were rumours and suspicions about Mrs. *Cochrane's* moral character, and that partly for that reason and partly

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from what he himself observed he ceased to visit Dr. *Cochrane's* family, being reluctant to visit any person whose moral character appeared suspicious, especially as he usually took his wife with him. So far as the argument has any sufficient foundation it would amount to this, that Mrs. *Cochrane* had an additional motive for desiring to remain at *Paris*. But it is obvious that there was no such motive operating on the mind of Dr. *Cochrane* except so far as her wishes might influence his.

I may here refer to a circumstance of some importance with respect to the question of Dr. *Cochrane's* intention with respect to domicile, viz., that he seems to have entertained an idea of purchasing a country house or landed property in *France*. *Adolphus Muhlberque*, the landlord of the *Hotel du Nord* at *Boulogne*, at whose hotel Dr. *Cochrane* and his family frequently stayed, and *Joseph Calamé*, who was Dr. *Cochrane's* butler and valet during the last year of his life, prove that he spoke of such a design. And Mr. *Beavan*, the boys' tutor, who resided many years in *France* and was himself a landed proprietor in that country, states in his affidavit that Dr. *Cochrane* made inquiries of him upon the subject of a foreigner acquiring and holding landed property in *France*, and that he was anxious to know whether the law of *France* placed any obstacles in the way of a foreigner acquiring landed property in *France*. The tendency of this fact is strongly in favour of an intention to reside permanently in *France*.

As a set-off, however, against this fact, we have another fact, the tendency of which is in an opposite direction, viz., that during Dr. *Cochrane's* residence at *Paris* he was anxiously endeavouring to increase his

estate at *Clippens* by the purchase of certain landed properties adjacent thereto. It appears from *Crow's* evidence taken in 1844 that before leaving *Clippens* Dr. *Cochrane* had entertained such a desire; and it is shown by Dr. *Cochrane's* letters to *Campbell* and to *Crow*, as well as by other evidence, that during the whole period of his residence at *Paris* he was in treaty for the purchase of two small properties adjoining to *Clippens*, the one consisting of two farms called the *Green* and *Mill of Cart*, and the other a farm called *Ryewraes*. His letters evince the greatest anxiety on his part to accomplish these purchases particularly the latter; and at length in 1831, shortly before his death, he succeeded with respect to *Ryewraes*, a contract having been then entered into by him for the purchase of that property for 6,000*l.* which was not completed till after his death. And the eagerness with which he pursued the object of adding to his *Clippens* estate is manifested by the fact that the price which he agreed to pay for *Ryewraes* amounted to no less than forty-three years' purchase.

It is true that Dr. *Cochrane's* desire to increase his property at *Clippens* may have had reference in some degree to the consideration that it would be the future residence of his descendants, and it may have been a regard to their future interest which induced him to add to the family property. And indeed there is direct evidence that he did anticipate that his descendants would reside at *Clippens*. The *Abbe Langan* says "I remember hearing him speak of some property he had in *Scotland*. He generally talked to me of that property with reference to a breed of horses which he had brought with him from *India* and which he kept there. He also often expressed to me his intention to keep the

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property in good order, so as to be ready for the reception of his sons in the event of any thing occurring. He never explained to me what this 'thing' meant, but I always understood that in the event of his death he desired his sons to reside there." But although Dr. *Cochrane's* expectation that *Clippens* would be the future place of residence of his sons may have constituted some part of the motive which made him desirous of increasing his property there, it is impossible I think to conclude that it was the whole or the only motive. And the eagerness with which he prosecuted that design appears to me to afford an argument of no slight weight in favour of the proposition that it was not his intention to abandon his Scotch domicile and adopt a French one.

But besides being anxious to buy property near *Clippens*, it appears that he desired also to purchase some estate nearer to *Edinburgh*, and he actually instructed his agents Messrs. *Hotchkiss* and *Meiklejohn* (W. S. of *Edinburgh*) to look out for such a purchase for him. This is proved by Mr. *Meiklejohn* in his deposition taken in 1844. It is also proved by both Mr. and Mrs. *Moorhouse* in their depositions taken in 1844 that during their visit to Dr. *Cochrane* at *Paris* in 1830, he told them that he then entertained such intention. This circumstance tends strongly to show an intention to retain the Scotch domicile.

Another fact, which seems to me to tend in the same direction as that which I have last mentioned is this, that he refused to allow his house at *Clippens* to be let. In February, 1826, Mr. *Campbell* informed him by letter that Mr. *Silvester Stirling* was willing to rent the house, leaving a room or two to be retained by Dr.

*Cochrane* if he desired it for the accommodation of his furniture. This offer was rejected by Dr. *Cochrane*. This fact also supplies an argument for the contention that Dr. *Cochrane* intended to resume his residence at *Clippens*.

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I must not omit to mention the will or trust deed of disposition executed by Dr. *Cochrane* in October, 1829, during his short visit to this country which I have already mentioned. By this instrument he disposes of all his property, real and personal. It is in the Scotch form, and at the same time so framed as to be valid and effectual according to English law ; but it does not seem to have crossed the mind of Dr. *Cochrane* or of his legal adviser that it was necessary that it should be framed in conformity with French law by reason of his having adopted a French domicile. In this instrument Dr. *Cochrane* describes himself as of *Clippens*. And it is always considered that the manner in which a man describes himself in solemn acts and legal documents is an important point with reference to the question of his domicile.

Another matter deserving of consideration on the question of Dr. *Cochrane's* intention is this, that during the whole period of his residence at *Paris* he not only continued to feel and to manifest a deep interest in *Clippens* and everything connected with it, but actually directed in detail the management of the property and regulated everything that was required to be done with respect to the house and lands and the horses and other animals that had been left there. From the very day on which he quitted *Clippens* till his death he kept up an uninterrupted correspondence with Mr. *Campbell*, his factor, at *Johnstone*, and with *George Crow*, the



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gardener, and especially with the latter. There are produced no less than from fifty to sixty letters to *Crow* alone, besides others not forthcoming. A perusal of these letters shows that Dr. *Cochrane* constantly makes the most minute inquiries, and obtains the most detailed information, respecting everything in and about *Clippens*. He gives specific directions as to the repairing or painting of the house and buildings; as to the cropping, manuring and mowing of the lands; and as to the management and improvement of the plantations; not contenting himself with giving general orders, but entering into and prescribing everything in minute detail. For example, he directs that, when the frost comes, cartloads of engine dust shall be thrown on the *Paddock Lane Road*. He orders the inside bank of a ditch to be raised to prevent water overflowing a road. He gives orders for the scouring of the ditches. Having instructed *Crow* to make a new road round the lawn near the house, he gives him very particular directions as to the breadth of the road, as to the nature of the materials to be used, and where they could be procured, and even directs that they should be brought by a round-about way which he points out in order to save toll; and he desires *Crow* to procure a measurement of the circumference and an estimate of the expense. He orders the planting of some willow trees at the end of a certain pond for the purpose of ornament. Nay, so minute and special is he in directing everything at *Clippens* that we find him telling *Crow* of a method for escaping the depredations of the rats on the corn bins, and even sending him the plan of a newly-invented rat trap to destroy them. Every year as the 18th of December (*Peter's* birthday) approaches he directs *Crow* to celebrate the day with the coachman and their families and neighbours by a feast, to which he regularly contributes two

guineas. But the matter which engrosses by far the largest portion of the correspondence is the stud. The letters are full of passages manifesting the intense interest he felt in the horses, and his solicitude for their welfare. He throughout gives the most precise and particular directions upon every point connected with their management and treatment. He prescribes the times and seasons at which they are to undergo the customary operations; he directs from time to time the purchase of hay and fodder for them; he evinces an eager curiosity to know what the colour of the foals will turn out to be. When he learns that any of the horses are sick or out of condition he prescribes the special food to be administered to them. When a drought occurs he directs *Crow* to hire a horse and cart to get water from the river for the use of the horses. He gives special instructions as to the breaking in of the young horses; nay, so entirely does he interfere with and direct the most minute details that we find him even directing the clipping of the tails of the foals, and actually ordering the purchase of a pair of scissors for the purpose. And not the horses only, but the dogs, the poultry, the pigeons, the rabbits, and even the cows are the objects of his unremitting care and the subjects of his special directions. It may seem almost ridiculous to descend to notice such trivial matters as these, but on a question of domicile the importance of a fact is often in proportion to its intrinsic triviality. In short these letters show that Dr. *Cochrane* continued to feel a deep interest in and attachment to *Clippens* and everything connected with it; and that he ordered and directed, throughout, the preservation, management and improvement of his estate and property there, so as to keep it always in such condition as to be at any time fit for habitation; and that he himself continued to direct and

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prescribe everything that was to be done there with respect to the house, the lands, the plantations or the horses and other animals, with almost as much particularity and minuteness of detail as if he had been personally present. It must be admitted that all this furnishes a strong argument to those who contend that Dr. *Cochrane's* intention was to return to reside at *Clippens*, and not to fix his permanent abode in *France*.

Before leaving these letters to *Crow* and to *Campbell*, I must observe that there are, scattered up and down them, expressions of his attachment to *Clippens*, and of the pleasure it would afford him to return thither; some of them have a more direct bearing on the question as to his intention to return or not to return to *Clippens*, though I do not think that any of them are decisive on the point. The following are the principal passages:— 24th August, 1825,—*Canterbury*, to *Crow*,—Referring to an attack made upon his crows by a neighbour he says, “If the poor crows can only maintain their existence *till my return*, they will again receive the protection which has brought on them this malevolent attack.” 25th January, 1826,—*Berne*, to *Crow*,—“I have been thinking *should it ever be my lot to live again at Clippens* (indeed I often thought of it when I was there) that it would be a desirable thing to have a road made &c.” 10th March, 1826,—*Berne*, to *Crow*,—“Mrs. *Cochrane*, as you observe, will shed a very different lustre over *Clippens* from that which it possesses in its present deserted state. *Our hearts will all bound with joy* when dashing up the approach to the house *on our return*. *But many ups and downs may take place before that happens*.” 19th April, 1826,—*Berne*, to *Crow*,—“I hope that Mr. *Carruth* will keep his promise to Mr. *Campbell*, and that the crows will be able to keep their footing *till my return*; I shall then

I trust find some means of protecting them against both Mr. *Cunningham* and Mr. *Carruth* and their instigators." And in the same letter, after mentioning the removal of the boys from *Hofwyl*, and the intention to return to *Paris*, he says, "How long we shall remain there, or whither proceed, is uncertain." And again in the same letter he desires *Crow* to tell one *James Cochrane* that he was remarkably well, and adds, "And that I do not despair of his seeing me *on my return* a sturdy old carl." 17th July, 1826,—*Paris*, to *Crow*,—Referring to a former letter he had written to *Crow*, dated the 11th, he says, "You will there see *we have settled* in this gay and dissipated metropolis *for a while*." 3rd January, 1827,—*Paris*, to *Crow*,—"Having no intention of returning to *Clippens* in the Spring, Mr. *Grant* will consult his convenience," &c. 7th February, 1827,—*Paris*, to *Crow*,—"Our return to *Clippens* will not yet be very speedy; but our hearts are all there; and on some future day we may gratify your friends by our presence, and recall more forcibly to their recollection the peace and plenty that prevailed there, and the hospitable reception and treatment that many of them experienced." 6th March, 1827,—*Paris*, to *Campbell*,—"I shall be content for the present to have the parts exposed in front of the house painted; and when I return I shall have the whole again and everything about it put into apple-pie order." 20th April, 1827,—*Paris*, to *Crow*,—"Tell *James Cochrane* I am glad to hear he continues pretty firm, and shall have great satisfaction in seeing him again in *Renfrewshire*." 21st June, 1827,—*Paris*, to *Crow*,—"I was glad you had given the old house a new suit. I shall be always pleased to see it neat and clean, and not bearing any marks of neglect and inattention. This is due to it for the shelter it afforded my family for so many years, besides its having been the place of my

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own birth." 8th October, 1827,—*Dieppe*, to *Crow*,—After mentioning that the boys had been placed under Mr. *Langan* at the college there, and that he and Mrs. *Cochrane* would shortly return to *Paris*, he says, "We had it very strongly in contemplation to have crossed the Channel to *Brighton*; and had that event taken place the boys I am sure would have allowed me no peace till I should have landed them fairly at *Clippens*; and no doubt Mrs. *Cochrane* and myself would have been as much pleased with the journey as they; but circumstances at that time forbad it. Happen however when it may, you may be assured we shall all be truly delighted. I promise myself great pleasure in surveying the young brood, some of whom I cannot doubt will prove very perfect and beautiful." [It is evident that he was here referring only to a temporary visit to *Clippens*.] 6th March, 1828,—*Paris*, to *Crow*,—"In reference to the report of my intention to return early next Summer, I can assure you *there was no ground for it whatever, never having contemplated such a thing*. When indeed we were at *Dieppe* last Summer we often talked of paying *Clippens* a visit, *but never with any serious design*; and had we crossed the Channel *our stay there would have been very short*. But whether we proceed thither temporarily or permanently you are likely to be the very first man to be informed of it." 20th June, 1828,—*Paris*, to *Crow*,—After saying that he had been anxiously looking for an offer for the sale to him of *Ryewraes*, but that it had not arrived, he adds, "Should it come however, it, added to *Blackstone's* offer, may render it expedient for me to return to *Renfrewshire* to conduct the negotiations. This will give me an opportunity of visiting you all; *but Mrs. Cochrane's return and that of the boys will be yet suspended for a while*. If I do return I shall do so immediately,

and in that case as the means of travelling are now so easy, safe and speedy, you may soon expect to see me." 5th July, 1828,—*Paris*, to *Crow*,—"I have as yet received no communication respecting *Ryewraes*, and now begin to despair. But for the expectation of this letter, and the probable expediency it might have imposed on me to proceed myself to *Clippens*, I should have despatched *Crowler* some time ago." Without date, but evidently about March, 1829,—*Paris*, to *Crow*,—"One of (or perhaps the whole of) the family may possibly pay you a visit in the course of the approaching Summer or Autumn, *but not then to settle at Clippens*. Before doing that we must visit *Germany* and *Italy*, and perhaps other countries on the Continent. For my own part I begin to be affected with some symptoms of the Swiss disease (*nostalgia*) or a *desire of returning home*. Indeed the same may be said of us all, as far at least as *Clippens* is concerned." 30th April, 1829,—*Paris*, to *Campell*,—"I am glad you found things going on well at *Clippens*. That place is so much connected with ancient associations that I always feel particularly interested about it." 9th June, 1829,—*Paris*, to *Crow*,—"We intend to surprise you by a visit probably in July or August. We purpose leaving this on or soon after the 15th instant; but we shall halt a few days at *Boulogne-sur-Mer*, and as many more in *London*; then two or three days perhaps in *Auld Reekie*, and then hurrah for *Clippens*, but where *we shall not be able to pitch our camp for want of our establishment*. It is therefore most probable our head quarters will be at *Paisley*, whence we shall duly make excursions to the seat of my nativity." 5th December, 1830,—*Paris*, to *Crow*,—After mentioning that two of the families who resided near *Clippens* were at *Paris*, he says, "The presence of these neighbours puts me in

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mind of *home* and auld lang syne." 4th May, 1831,—*Paris*, to *Crow*,—"If I were at *home*, I am not sure whether I would not have the young *Carryths* indicted as nuisances for shooting into my wood." Now these passages appear to me to lead to the inference that Dr. *Cochrane* looked forward to returning to reside at *Clippens* as an event which he himself at least ardently desired, and as one which he intended should take place at some future indefinite period; though I think that whenever a final return to *Clippens* is referred to, it is rather as an event that *may* probably happen, than as one that *will* certainly happen.

Having considered the *written* declarations or expressions which came from Dr. *Cochrane* in any way tending to show his intention as to domicile, I must now examine such *verbal* declarations as are attributed to him by the several witnesses from the commencement of his residence at *Paris*. And first I will notice those which occurred during the short visit he made to *Scotland* in 1829, when (as I have already mentioned) he stayed for three or four weeks at an hotel at *Glasgow*, driving over two or three times a week to *Clippens*. *Crow* in his deposition in 1844 speaking of that visit deposes as follows:—"The testator (Dr. *Cochrane*) mentioned to me his intention of returning to the Continent when I expressed my regret that he did not come and reside at *Clippens*, to which he replied that he could not come to settle with us just then, but that he would not be long before he would do so; it might be a year and a half." On his examination in 1854 he says "I remember Dr. *Cochrane* once saying he would soon be home and then everything should be put in apple-pie order, but I cannot say when it was." I think this must have occurred during the visit of 1829,

it could hardly have been previous to his departure in 1825. *Grant*, the miller, examined at the same time says, "About 30th August, 1829, the said testator (Dr. *Cochrane*) called on me at *Glentyan* Mill and left a note, saying he wished to see me at *Glasgow*. I called on him there about 2nd September, and I said 'Doctor, instead of getting better you are getting thinner and looking worse; you had better come back to *Clippens*.' And he said he wished to come back to his own house where he was bred and born; that he was going back to *France* to arrange his business and should return in the Spring of the year. He informed me he had a stud of six horses where he was then residing. When he shook hands with me at parting I said, 'Doctor, I am afraid I shall never see you again.' He replied, 'Oh yes, I am hearty yet; I shall live two or three years, and be home in the Spring of the year.'" In his subsequent deposition in 1854 he states the conversation thus: "I said to him, 'Doctor, I shall never see you again;' but he said, 'Oh yes, you will. I am pretty strong yet. I am first going to wind up my affairs, and return home to my own place.'" And in his cross examination he says, "When I had the conversation with Dr. *Cochrane* in *Glasgow* in 1829 he said he wished to come back to his own house, where he had been bred and born." *William Lockhead*, examined in 1854, speaking of the visit in 1829 says, "The Doctor said that he would be back in eighteen months and not to weary." It will be observed that what Dr. *Cochrane* said to *Grant* is altogether different in its import from what he said to *Crow* and *Lockhead*; but perhaps what he said to *Grant* had reference only to a projected temporary visit, like that of 1829.

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The remaining verbal declarations or expressions of

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Dr. *Cochrane* are such as were uttered by him to various persons at *Paris*, and in connection with them are some which fell from Mrs. *Cochrane*. Some of these passages only amount to expressions of a preference for *France* over *England* or *Scotland*. Some of them are explicit declarations of an intention to reside permanently in *France*, and others of them are equally explicit declarations of a contrary intention.

Having had occasion to refer to the evidence given by Mr. and Mrs. *Moorhouse* in 1845, as being very important evidence on the question of domicile, I ought to notice the attempt now made by them to get rid of its effect. With this view they have examined themselves as witnesses on their own behalf; and they say that the evidence they gave in 1845, which was most decisive to prove that Dr. *Cochrane* did not intend to reside permanently in *France*, but that he fully intended to return to reside in *Scotland*, was given in ignorance of the circumstances relating to Mrs. *Cochrane's* familiarity with the groom, and its effect on the neighbours, and they now depose that the knowledge of those circumstances which they have recently acquired has had the effect of totally changing their opinion on the subject. And Mr. *Moorhouse* now declares that he considers that Dr. *Cochrane* neither could nor would return to reside in *Scotland*; and Mrs. *Moorhouse* says she does not think her father could have lived in *Scotland* happily and comfortably, and she does not think he would have returned to *Scotland*. Now it must not be expected that the Court should regard with implicit confidence this total change of opinion on the part of Mr. and Mrs. *Moorhouse*; nor must the question be considered as invidious or unfair, if I inquire whether this change of opinion is accompanied by a change of

interest in the matter. Now in 1845 Mr. and Mrs. *Moorhouse* were not parties to the suit, they were simply examined like any other witnesses on the part of the then Plaintiff. They were acquiescing (outwardly at least) in the universal assumption of Mrs. *Moorhouse's* illegitimacy, and they were not then aware that by the law of *France* an illegitimate child was entitled to any share in the succession of the putative father. If therefore they were under any bias of interest in the matter at the time of their examination in 1845, that bias would be in favour of a Scotch domicile as affording the best chance of establishing their claim to a legacy of a lac of rupees bequeathed to Mrs. *Moorhouse* by the wills of 1818 and 1821. But they have now discovered that by the law of *France* an illegitimate child may under certain circumstances be entitled to a share in the succession, and therefore the bias of interest is now in favour of a French domicile. I do not mean to impute to Mr. and Mrs. *Moorhouse* that they have sworn falsely with a view to their interests, but I am bound to look with great mistrust upon a declaration of a total change of opinion when it is accompanied by a corresponding change of interest. But suppose I give full credence and effect to the declaration of this change of opinion on the part of Mr. and Mrs. *Moorhouse*, how will it affect the case? Their change of opinion will not get rid of the facts they have previously sworn to, and it is by the evidence of *facts* and not of *opinions* that the decision of the Court must be governed. The declarations, which according to their former depositions were made to them by Dr. *Cochrane*, remain uncontradicted, and their effect stands quite unaffected by any change which may have since come over the opinions of the witnesses. To meet this difficulty the learned counsel for Mr. and Mrs. *Moorhouse* have skilfully and

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ingeniously suggested that Dr. *Cochrane* in making to Mr. and Mrs. *Moorhouse* the declarations of intention which they deposed to in 1845, was intentionally and studiously deceiving them; and that his object was to make them believe that he meant to return to *Scotland*, when in fact he was all the time entertaining a totally opposite intention. What the ground is for this theory I confess I am at a loss to understand. Neither Mr. nor Mrs. *Moorhouse* pledges his or her belief that such was the case, still less does either of them assign any motive for Dr. *Cochrane* desiring so to deceive them. Why should Dr. *Cochrane* desire to make them believe that he meant to return to reside in *Scotland* if he had formed a contrary determination? Why should he not have represented to them his real intention (if such it was) to reside permanently in *France*? If it was necessary to give a reason for such a resolution, why should he not have said, as he did say to several of the witnesses, that he liked Parisian life and society, or that the climate of *France* was better suited to his health and constitution than that of *Scotland*? I see no more reason for concluding that Dr. *Cochrane* was purposely making false representations of his intentions to Mr. and Mrs. *Moorhouse* than that he was so doing to any other of the witnesses to whom he spoke on the subject.

I have now gone through all those portions of evidence which bear upon the question of Dr. *Cochrane's* domicile; and the result of it appears to me to be this: When I consider the motives which may be supposed to have operated on the mind of Dr. *Cochrane*, I find that some of them are such as would incline him to a residence in *Scotland*, others to a residence in *France*. Three motives are assigned as tending to induce Dr.

Cochrane to reside at *Paris*. First, a taste for Parisian life and society, as well as for the climate of *France*, as most suitable to his constitution ; secondly, the effect produced at *Clippens* by Mrs. *Cochrane's* conduct with respect to the groom, and the displeasure felt towards the neighbours on that and other grounds ; and thirdly, the desire to educate the sons abroad : the last, special and temporary ; the other two of a more permanent character. On the other hand strong motives for intending to return to reside at *Clippens* may be found in his attachment to his native country, and to *Clippens* in particular, as being the seat of his ancestors, his own birthplace, his property which he delighted to improve and increase, and the spot where he was surrounded with those objects which best suited his natural tastes and propensities. Among these conflicting motives it is not easy to say which would preponderate in his mind ; but a perusal of all the evidence rather inclines me to the opinion that these latter motives would with Dr. *Cochrane* himself outweigh the others. If I examine the acts and conduct of Dr. *Cochrane*, there is much which, if taken by itself, would lead to the conclusion that he had abandoned his Scotch and acquired a French domicile. The mere fact of his residing in *France* for full five years is of no slight importance. His taking an unfurnished dwelling and furnishing it at his own expense, but especially his doing this a second time at still greater expense after he had already resided three years and a half at *Paris*, and the expensive establishment of servants, horses and carriages which he kept up, are facts which afford a strong argument in favour of a French domicile ; and so also is the fact of his having meditated the purchase of landed property in *France*. On the other hand there are other portions of his acts and conduct which seem to me to have a

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strong contrary tendency. The intense interest which he manifested in everything at *Clippens*, and the minuteness and particularity and constancy with which he continued during his whole absence to direct, regulate and prescribe all the details of the management of the property and the treatment of the horses and other animals there, as if his object was to have the place always ready for re-occupation; his refusing to let it; the eagerness with which he prosecuted and effected his purpose of adding to his property there; his endeavour to purchase other property in *Scotland* nearer to *Edinburgh*; his describing himself in his last will or trust deed of disposition as of *Clippens*; all these are circumstances which tend strongly in favour of his retention of his Scotch domicile. And it appears to me that the inferences which may be drawn from the acts and conduct of *Dr. Cochrane* are pretty evenly balanced. Again, when I look at *Dr. Cochrane's* declarations of intention, whether written or verbal, I find the same sort of inconsistency, some of them tending in favour of a Scotch, and others of them in favour of a French domicile.

In such a state of things, what is the principle which ought to govern the decision of the Court on the question of *Dr. Cochrane's* domicile? There is one principle very well established, namely, that slighter evidence is required to warrant the conclusion that a man intends to abandon an acquired domicile and to resume his domicile of origin, than is necessary to justify the conclusion that he means to abandon his domicile of origin and to acquire a new one. And another principle is that which is referred to by Lord *Cranworth* in *Whicker v. Hume* in the House of Lords, namely, that it requires stronger and more conclusive evidence to justify the Court in deciding that a man has acquired

a new domicile in a foreign country, than would suffice to warrant the conclusion that he has acquired a new domicile in a country where he is not a foreigner. For instance, the Court would more readily decide that a Scotchman had acquired a domicile in *England*, than that he had acquired a domicile in *France*. In truth, to hold that a man has acquired a domicile in a foreign country is a most serious matter, involving as it does the consequence that the validity or invalidity of his testamentary acts, and the disposition of his personal property, are to be governed by the laws of that foreign country. No doubt the evidence may be so strong and conclusive as to render such a decision unavoidable. But the consequences of such a decision may be, and generally are, so serious and so injurious to the welfare of families, that it can only be justified by the clearest and most conclusive evidence. In the present case the question is whether Dr. *Cochrane*, whose domicile of origin was Scotch, abandoned that domicile and acquired a domicile in *France*, where he was in every sense a foreigner. And it appears to me that the evidence in the case is not of that clear and conclusive character which would justify me in deciding in favour of the foreign domicile.

Furthermore, if I try the question by the criterion of the often-cited definition from the Roman law to which I have before referred, it does not appear to me that the circumstances of Dr. *Cochrane's* residence in *France* satisfy the requirements of that definition. For admitting that he had established his household (*larem*) in *Paris*, how can it be said that he had there established the chief part or bulk of his business and of his property (*rerum ac fortunarum summam constituit*)? So far as he had any business (*res*), the business in which

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he was incessantly engaged was the management and improvement and augmentation of his estate at *Clippens*, and the directing and regulating of everything connected with it: business he had none at *Paris*. And as to property (*fortunæ*) he had nothing at *Paris* but his furniture and equipage, the chief part or bulk of his property, so far as his property had any locality, was certainly at *Clippens*. Of *Scotland* only, and not of *France*, could it be truly said, in *eo loco rerum ac fortunarum summam constituit*. It may admit of more doubt whether the subsequent part of the definition would apply to his residence at *Paris*,—*unde rursus non sit discessurus, si nihil avocet; unde cum profectus est, peregrinari videtur; quod si rediit, peregrinari jam destitit*; but I strongly incline to the opinion that his intention throughout was at some future time to quit *France*, without being called away by the happening of any special event, and to reside permanently in *Scotland*; and as to his feeling himself at any time a wanderer from home, I think it was when he left *Clippens* for the Continent, and not when he made the short visit to *Scotland* in 1829. I think his feelings on the occasion of that visit were that he was re-visiting his home, though but for a short time, and not that he was wandering from it.

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I must pronounce for the Scotch domicile.

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28th Jan.

*Act of  
Parliament.  
Railway  
Company.  
Costs.*

**Re THE TRUSTEES OF ST. BARTHOLOMEW'S  
HOSPITAL.**

**THE** *London and North Western Railway Company* had taken some property belonging to *St. Bartholomew's Hospital*, and the purchase money, 1,056*l.*, had been in the usual manner paid into Court.

Two re-investments in the purchase of land had been made, leaving a balance of 243*l.*, and on both those re-investments the company had paid the costs.

The trustees now came for a sum of 90*l.* further, to effect a purchase of a strip of land, abutting on one side on the hospital, and on the other on land belonging to the trustees, as trustees of another charity.

*Mr. Chapman Barber*, for the purchaser, asked that the company might pay the costs.

*Mr. Speed* for the company.

The Lands Clauses Act did not intend that parties should split up their purchase-money indefinitely in small purchases, and throw repeated costs on the company. The act, sect. 80, says the costs of one application only for re-investment in land shall be allowed, unless it shall appear to the Court that it will be for the benefit of the parties that such re-investments should take in different sums, and at different times. Firstly, that language does not mean that there shall be repeated applications, but one application for several purchases; secondly, if that is not the construction, it is

The Lands Clauses Consolidation Act, sect. 80, contemplates not one application in respect of several re-investments, but several applications, and where it was shown to be "for the benefit of the parties," the Court ordered a company to pay the costs of a third re-investment in a very small purchase. •



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altogether in the discretion of the Court ; and the Court will not allow parties capriciously to split up their re-investments at the costs of the company. [He cited *Ex parte Eton College (a).*]

The VICE-CHANCELLOR :

There is but a small sum left, viz. 243*l.*, and it is sought to lay out 90*l.* of that in a purchase. Now no doubt the intention of the legislature was to protect companies against reckless and careless re-investments, but not against the costs of *bonâ fide* re-investments ; the act clearly contemplates several and successive investments ; for it speaks of "different sums" and re-investments "at different times," which is inconsistent with the construction contended for. Then what are the circumstances here : there is a strip of land belonging to this charity ; next to it this strip which it is desired to purchase ; and next to that, a strip belonging to the same trustees. It is obvious that it is convenient and advantageous that the trustees should possess that intermediate strip ; it is for the benefit of the parties, and therefore I think the case within the intention of the act, and the company must pay the costs.

(a) 3 Rail. Cas. 271.

VERITY *v.* WYLDE.  
*Re* DOWNES.

1859:  
11th Feb.

*Practice.*  
*Solicitor's Lien.*

**T**HIS was a petition by *John Downes*, the former solicitor of the Plaintiff in the suit, and it prayed for an order that no decree or order might be made for disposing of a certain sum of about 600*l.* ordered to be brought into Court in the suit, without providing for the costs which should be found due to the Petitioner; or in the alternative, that no such order should be made without notice to the Petitioner.

A solicitor's lien is not a general lien on a fund in Court though brought in by his exertions, but only on what may, on the issue of the suit, belong to his client. Therefore, where by the exertions of a Plaintiff's solicitor, a fund was ordered to be brought into Court on which the Defendants had a primary claim, and afterwards the Plaintiff changed his solicitor, and the parties were proceeding without bringing the fund into Court to divide it under compromise, without paying the Plaintiff's original solicitors: Held, that he had no lien on the fund, but it was ordered

The bill was filed in May, 1858, by Mr. *Verity*, a debtor, to enforce the execution of the trusts of a creditors' deed, by which he had assigned all his property to the Defendant *Wylde* and another trustee upon trust for his creditors, with the usual resulting trust for *Verity*. The deed was an ordinary creditors' deed, but it expressly required that any sum above 50*l.* should not be retained in hand by the trustees, but paid into a particular bank to their joint account.

The bill alleged various breaches of trust against the trustees; in particular that the trustees had by arrangement between themselves permitted a sum of between 500*l.* and 600*l.*, part of the assets, to remain for a long time to the private account of one of them at his own bankers. On a motion for an injunction and receiver made on the 3rd *June*, 1858, the last-mentioned allegation was proved, and upon the footing of that matter, the Court had ordered a receiver. The other alleged

that no order should be made by compromise or otherwise for payment of any money to the Plaintiff without notice to the Plaintiff's original solicitor.


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breaches of trust were denied or explanation of them was given ; so that it could not be said at this stage of the cause that they were established. Mr. *Downes*, the Petitioner, was the Plaintiff's solicitor, from the filing of the bill to the 15th of June, when the Plaintiff changed his solicitor, leaving a considerable balance of costs due to the Petitioner. On the motion for a receiver, the sum in the hands of the trustees had been ordered to be brought into Court ; and certain costs, amounting to 35*l.*, which were on that motion ordered to be paid by the Defendants, the trustees, to the Plaintiff, were paid by them to the Plaintiff personally, and not to the Petitioner, to whom they still remained due.

In this state of things it was shown in support of the petition, that the Plaintiffs and Defendants had agreed not to bring the money into Court, and were arranging a compromise, under which they were to pay the costs of the trustees, and to pay a composition to the creditors. It did not appear clearly whether anything was to be paid to *Verity* ; but it was alleged by the Petitioner and not denied, that at any rate no provision was intended to be made for the costs due to the Petitioner. On the question whether in the result of any arrangement, or of an administration of the trust, any surplus would arise to the Plaintiff, the evidence was conflicting. The bill alleged, and the Plaintiff's evidence used on the motion for a receiver showed, that there would be a surplus ; on the other hand, both the Plaintiff and the trustees now swore, that there was not enough property to pay the creditors 10*s.* in the pound. In this state of things the present petition was presented.

Mr. *Drewry* for the Petitioner.

If the order had been obeyed, and this sum of money had been brought into Court, the Petitioner would have had a lien upon it for his costs; at any rate so far as the Plaintiff's interest extended. The Court will not allow that lien to be defeated by the parties disobeying the order, and dividing the money out of Court. He claims a lien on the whole fund, because until the cause is brought to a hearing, it cannot be determined whether the Court will not give the Plaintiff his costs out of this fund. The fund belongs no doubt to the creditors; but the Court, having jurisdiction over it, may think fit to give the Plaintiff's costs out of it, and so the Petitioner's lien extends over the whole. The Court will at any rate, if it cannot make the prospective order asked, make an order according to the second branch of the prayer, which will be in the nature of a stop order.

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Mr. *Ward* for the Plaintiff.

The Petitioner has no *locus standi* at all. It is clear nothing can come to the Plaintiff but by the mercy of the creditors; and if there is no surplus, there is no fund belonging to the Plaintiff. The Petitioner has therefore no lien on this fund, which belongs to strangers, and the petition altogether fails.

Mr. *J. H. Palmer* for a creditor, a Defendant, contended that the fund belonged to the creditors, and the Plaintiff had no interest in it, and consequently his solicitor could have none: no order as against them could be made.

Mr. *Sheffield*, for the trustees, argued that no order could be made as against them; if the Plaintiff and the creditors thought fit to compromise and pay the trustees' costs, they had a right to do so; nothing could come to the Plaintiff except subject to the creditors' right.

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Mr. *Drewry* in reply.

The Petitioner has at any rate a clear right to notice before anything is paid to the Plaintiff; and whether his right extends as against the *creditors* or not, it extends at any rate to having notice before any payment is made to the *trustees*. It is at least possible, looking at the nature of the case, that the trustees would at the hearing be made to pay costs, or have no costs. And anything paid to them by arrangement diminishes *pro tanto* the fund which might accrue to the Plaintiff. Till the accounts are properly taken, it cannot be said with certainty that there will be no fund belonging to the Plaintiff.

## The VICE-CHANCELLOR:

This is a petition, that nothing shall be paid to the parties to the suit or any of them until provision shall be made for payment, to the Petitioner, of the costs which he has incurred in the suit; or in the alternative, that no order may be made with respect to the fund without notice to the Petitioner. On the 23rd of May *Verity* filed his bill. [The Vice-Chancellor then stated the facts, and proceeded :]—

Up to the time when the order of the 3rd of June was made, the Petitioner acted as the solicitor of *Verity*. It appears that the parties to the suit are now proposing to come to an arrangement, which from all I can see is a wise arrangement; and under that arrangement the fund is proposed to be appropriated for payment of the costs of the trustees, and in satisfying the creditors as far as it would go.

I see no doubt in this case as to how the law stands.

The law is plain. The solicitor for a Plaintiff has no lien on the fund, the subject of the suit, as against the other parties, but only a right that whatever he can recover shall not be paid to his client until his costs are paid; but that is not a lien against the particular fund in Court. But here the Petitioner prays that the rights of all persons on the particular fund shall not be dealt with without notice to him. The right, as I have said before, is that, if anything in the suit should be payable to Mr. *Verity*, or payable as Mr. *Verity's* costs, then Mr. *Verity's* solicitor has a right to say, "Do not let it go until my costs are provided for, as I have been the person who obtained that benefit for him." But it is not consistent with any principle, that the right of the solicitor should preclude any compromise between the parties, and if it were to have that effect, the sooner such a right is abolished the better. I recognize no such right as that asked by the petition. I recognize the right of the Plaintiff's solicitor, if the Plaintiff shall attempt to receive any of the money in question in the suit so as to exclude him, to be protected. And here I find that 35*L* of costs due to the Petitioner, have actually been paid to the Plaintiff. I think therefore the Petitioner's application is justified to the extent of giving him an order, that no order shall be made in this suit by way of compromise or otherwise, for the payment of any sum of money to Mr. *Verity*, without notice being given to the Petitioner. But the trustees of the creditors deed, and the two creditors who appear as Defendants must be paid their costs of this application by the Petitioner, and the Plaintiff must pay his own costs. [The order was made accordingly.]

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February 15.

*Acknowledgment.*

*Specialty Debt.*  
*Statute of*  
*Limitations.*

MOODIE *v.* BANNISTER.

THIS case came on upon a summons adjourned from chambers.

The acknowledgment provided for by the 5th sect. of the 3 & 4 Will. 4, c. 42, in order to take a specialty debt out of the operation of that statute, need not be made by the person chargeable to the person entitled, or amount to a promise to pay. Held, therefore, that an admission of a bond debt, contained in the answer of the executors of the obligor in a suit to which the obligee was not a party, was sufficient to take the bond debt out of the operation of that statute.

A residuary legatee may set up the Statute of Limitations as against creditors in an administration suit, though the executors do not take the objection.

The question was, whether a debt of 299*l.* due on a bond executed on the 30th of November, 1821, in which *John William Bannister* was principal, and *John Bannister* surety, and which bond was executed in favour of *George Heastey*, had become barred through lapse of time under the provisions of the 3 & 4 Will. 4, c. 42, or whether certain admissions contained in an answer of the executors of the obligor, in a suit to which the obligee was not a party, amounted to such an acknowledgment of the debt as would under the 5th section (a) of that statute have the effect of preventing the debt being barred.

(a) Sect. 5 of the act 3 & 4 Will. 4, c. 42, provides—  
“That if any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such action to bring his or their action for the money remaining unpaid and so acknowledged to be due

within twenty years after such acknowledgment by writing, or part payment, or part satisfaction as aforesaid; or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be

The above suit of *Moodie v. Bannister* was instituted by a residuary legatee against the executrix for the administration of the estate of *John Bannister*, and a decree for administration was made.

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Under that decree the executors of *George Heastey*, the obligee of the bond, came in before the chief clerk at chambers to prove their debt, and claimed to be creditors of the estate of *John Bannister* on the bond.

This claim was objected to by the Plaintiff, the residuary legatee, on the ground that the debt on the bond had become barred by the Statute of Limitations.

The claim was adjourned for argument into Court.

It appeared that on the 30th of November, 1821, *John William Bannister* and *John Bannister* became jointly and severally bound by bond conditioned for the payment of 299*l.* to *George Heastey* on the 30th of November, 1824.

By the terms of the bond both the obligors were principal debtors, but in fact *John Bannister* was surety only for *John William Bannister*.

*John Bannister* and *John William Bannister* both subsequently died. The amount due on the bond was never paid.

A suit having been instituted for the administration and the plaintiff or plaintiffs in any such action or any indenture, specialty or recognizance may, by way of replication, state such acknowledg-

ment, and that such action was brought within the time aforesaid, in answer to a plea of this statute.



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of the estate of *John William Bannister*, the principal debtor, the amount due on the bond for principal and interest was proved against that estate, but nothing was received from the estate of *John William Bannister*.

On the part of the claimant it was admitted that the statute had barred the claim unless the admission contained in the answer of the executrix filed in the suit of *Moodie v. Bannister* had revived the debt, which it was contended was the effect of such admission.

The admission contained in the joint answer of the executrix *Esther Bannister* and of her sister *Elizabeth Ruth Bannister*, was as follows:—

“ Say that the only debt of the said testator which to our knowledge still remains unpaid is a sum of 299*l.* with a considerable arrear of interest due to one *George Heastey* upon the testator’s bond.

“ Say that such debt has not hitherto been paid, because the said testator was party to the said bond as surety only for our brother *John William Bannister*, deceased, who died in the year 1829, and whose legal personal representative the said *William Falconer Walker* is, he having, under the advice of *John Flather*, taken out letters of administration to the estate of the said *John William Bannister*, with his will annexed, and *Susan Frances Bannister*, who was appointed sole executrix of the said will, having first, under the advice of said *John Flather*, renounced probate of the said will.

“ Believe that a suit was instituted in this Honorable Court for the administration of the estate of the said *John William Bannister*, under which the said *George*

*Heasley* expected to get paid, but he now claims to be paid out of the estate of said testator *John Bannister*, and has threatened proceedings against this Defendant *Eather Bannister*, as the legal personal representative of the said testator."

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Mr. *Dickinson* for the claimant.

This case is governed solely by the statute 3 & 4 Will. 4, c. 42. Previously to the passing of that statute there was no statutable bar to specialty debts, and an action might have been brought on a specialty debt after a lapse of any length of time. The jury was however charged after a certain time to presume that the debt had been discharged. This presumption, however, might have been rebutted by evidence to the contrary, and an admission of the debt by the person liable would have been sufficient evidence to the contrary. It is not required by the statute that such an admission should be made by the person liable to the person entitled, and therefore an admission in an answer of the executors of the debtor in a suit to which the person claiming is not a party is a sufficient admission of the debt, and though not made to the claimant may be made use of by him: *Pennell v. Meyer* (a).

The case is not affected by the statutes 21 Jac. 1, c. 16, s. 3, and 9 Geo. 4, c. 14, s. 1, for these statutes do not relate to debts on bonds. But even under the statute of James 1, an admission would have taken the case out of the statute, though the statute contains no provision to that effect, and such an admission need not have passed between the parties: *Halliday v. Ward* (b). Under the statute of Geo. 4, however, it would have

(a) 2 Mood. & Rob. 98.

(b) 3 Camp. 32.

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been different, because in that statute the words "acknowledgment" and "promise to pay" are convertible terms, and therefore an acknowledgment must have been made to the person claiming, but that statute related to simple contract debts only.

No promise to pay is required by the statute 3 & 4 Will. 4, c. 42, which governs this case. *Rodham v. Morley* (a) is an authority showing that a payment by a devisee for life of interest on a testator's specialty debt is an acknowledgment within the terms of the act, and is of itself sufficient to keep the right of action alive in respect of the debt and interest against all persons interested in remainder, and that without any promise to pay.

The decisions under the Statute of Frauds would, to a certain extent, support this argument. It has been frequently held that it is not necessary that a writing for such a purpose should be in communication from the person to be bound to the person entitled, it being enough that the person to be bound should by some writing, to whomsoever addressed, admit the terms of the contract (b). In *Barkworth v. Young* (c), a statement of an agreement contained in an affidavit was held to be sufficient.

It is not competent for a residuary legatee to intervene and raise the inequitable objection of the statute even against an executor, so as to prevent him from retaining a debt due to himself, but which had been barred by the statute in the testator's lifetime: *Stahlschmidt v. Lett* (d); *Hill v. Walker* (e). If then the

(a) 1 De G. & Jo. 1.


(c) 4 Drew. 1.

(b) See *Morgan v. Holford*,  
1 Sm. & G. 101.

(d) 1 Sm. & G. 415.

(e) 4 Kay & J. 167.

executors' right cannot be objected to by a residuary legatee, much less can the latter intervene in a question which is properly one between an executor and a creditor.

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Mr. *Langworthy* for the residuary legatees.

There is not in the present case such an acknowledgment as is required by the fifth section of the statute of James.

1. Under the old law an acknowledgment was required merely for the purpose of rebutting the presumption of payment: *Clark v. Hougham* (a); *Bryan v. Horseman* (b); *Baillis v. Lord Inchiquin* (c); *Lloyd v. Maund* (d).

2. The old law was altered by the decision in *Tanner v. Smart* (e), and now a promise to pay or an acknowledgment made with the view or intention of payment is required: *Cripps v. Davis* (f); *Grenfell v. Girdlestone* (g); *Holland v. Clark* (h); *Rackham v. Marriott* (i).

3. An express promise is necessary to bind executors: *Tulloch v. Dunne* (k); *Atkins v. Tredgold* (l).

4. The residuary legatee may set up the statute against

(a) 2 B. & C. 154.

(b) 4 East, 599.

(c) 1 Esp. 435.

(d) 2 T. R. 760.

(e) 6 B. & C. 603.

(f) 12 Mee. & W. 159.

(g) 2 Y. & C. Ex. 662, 676.

(h) 1 Y. & C. C. C. 151.

(i) 3 Jur. N. S. 495.

(k) 1 Ry. & Moo. 417.

(l) 2 B. & Cre. 28.

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creditors, though the executor does not: *Shewen v. Vanderhorst* (a); *Briggs v. Wilson* (b).

Mr. *Speed*, for the executrixes, in the same interest, cited *Hart v. Prendergast* (c); *Kennett v. Millbank* (d); *Linsell v. Bonsor* (e); *Batchelor v. Middleton* (f); *King v. Knight* (g); *Gale v. Laurie* (h); *Lucas v. Dennison* (i); *Howcutt v. Bonser* (k); *Thompson v. Waithman* (l).

The VICE-CHANCELLOR, after stating the facts of the case said :—

The question is, whether the Statute of Limitations has barred this debt.

It appears to me to be clear, that, although the executrix did not set up the Statute of Limitations, the residuary legatee is not precluded from doing so, and that therefore the Plaintiff had the right to set up the statute.

It is admitted that the statute is a bar at the expiration of twenty years after the debt has become payable, unless there has been such an acknowledgment of the debt as is provided for by the statute.

The ground taken by the claimant is, that by her answer to the bill the executrix of the testator has admitted that the debt is still due on the testator's

(a) 1 R. &amp; M. 347.

(b) 5 De G., M. &amp; G. 12.

(c) 14 M. &amp; W. 741.

(d) 8 Bing. 38.

(e) 2 Bing. N. C. 241.

(f) 6 Hare, 82.

(g) 4 T. R. 419.


(h) 5 B. &amp; C. 156.

(i) 13 Sim. 584.

(k) 3 Ex. 491.

(l) 3 Drew. 628.

bond. I cannot conceive a more distinct acknowledgment of the existence of the debt as a debt due and unpaid. Then comes the question whether this is such an acknowledgment as comes within the language and intention of the statute 3 & 4 Will. 4, c. 42, s. 5.

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The statute of James does not contain any mention of a promise to pay. The language of that statute is, that all actions of debt &c. shall be sued for within six years next after the cause of such action or suit, and not afterwards, and the word acknowledgment is not used in that statute. The construction which the Courts of Law have put on that statute is, that after six years have passed any action must be brought not on the original contract, but on some subsequent act, which must amount to such an acknowledgment as will constitute a new cause of action. The cause of action on which the action is brought must have arisen within six years. If, therefore, an acknowledgment were relied on, it must have been such an acknowledgment as amounted to a cause of action; and that which amounts to a cause of action is a promise to pay; so that either directly or by implication there must be a promise to pay which constitutes the cause of action, and which, if made within six years, is what is provided for by that statute. Now the acknowledgment of the existence of a debt is not necessarily either a contract or a promise to pay—it is not necessarily a cause of action, but can only be a cause of action if it amounts to a promise to pay. The acknowledgment may amount to a promise to pay, or it may be a perfect acknowledgment of the existence of the debt, and yet not be a promise to pay it; and the simplest case which has been put is this. Suppose a man owes a debt to A., and he in conversation tells his wife or son that he owes that debt, how can such an

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acknowledgment made to a third person amount to a promise to pay? and that is the principle upon which the cases under that statute have been decided. The Courts under that statute at one time went so far as to say, that an actual denial of the debt amounted to an acknowledgment, and so to a promise to pay, and therefore to a good cause of action. Now, happily, that construction of the statute has been abandoned; and the only question under that statute will be, when an acknowledgment is relied upon, was that acknowledgment either expressly or by implication a promise to pay?

Then came Lord *Tenterden's* Act, 9 Geo. 4, c. 14, s. 1, requiring the acknowledgment to be in writing. That act was framed with a view to the state of law then existing. There was nothing but the statute of James and the decisions which the Courts of Law had come to on it. The statute 9 Geo. 4, provides, that in actions of debt, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the statute, unless such acknowledgment or promise shall be made or contained in some writing to be signed by the party chargeable thereby.

The whole effect of that statute was, that whereas before the statute there might have been an acknowledgment of a debt by parol, which might amount to a promise to pay, and therefore be a new cause of action, that statute provides that no such mere verbal acknowledgment shall have that effect, but the acknowledgment must be in writing; that was the whole effect of that statute. And so the matter stood so far as respected simple contract debts.

But how did the matter stand with regard to specialty debts? The principle on which the Courts acted was this. There was no statute which prevented a bond creditor coming and claiming his debt at any time; but the Courts of Law, and the Courts of Equity following them, held the doctrine of presumption, that after a certain lapse of time payment must be presumed; and where an action was brought on a debt or bond or other specialty, all that the Courts of Law did with respect to a defence founded on lapse of time was, that after twenty years the Judge would direct a jury to presume payment. Of course that presumption, like any other, was capable of being rebutted by evidence; and the Courts held that evidence of an acknowledgment would be sufficient to rebut the presumption; and how could a debtor against whom an action was brought ask the Court to presume that the debt had been paid when he himself had acknowledged the existence of the debt? It would be absurd; and therefore it appears to me that the principle was rightly stated, that in the case of a specialty debt the Courts would receive in evidence any acknowledgment of the alleged debtor in any shape, even when that acknowledgment was made to a third person, and that it was not necessary that such acknowledgment should amount to a new cause of action.

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So the rule of law in this matter stood till the passing of the act with reference to real estate(*a*), and in that same year the act (*b*) was passed upon the construction of which the present question turns. The purpose of this last act was to make an express statutory limitation with respect to specialty debts which did not before exist. And the statute enacts the bar precisely in the

(*a*) 3 & 4 Will. 4, c. 27.

(*b*) 3 & 4 Will. 4, c. 42.




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form in which the statute of James had limited simple contract debts, namely, that all actions of debt shall be commenced or prosecuted within the time hereafter expressed and not after; that is to say, actions of debt upon bond or other specialty within twenty years after the cause of such action or suit, but not after. So that if this statute had stopped there, and the fifth section had not been inserted, the effect would have been to have put simple contract debts and specialty debts on the same footing, except that the specialty debt had twenty years and the simple contract debt only six years within which the action must have been brought.

[His Honor here read the fifth section of the act above set out, and proceeded:]—Now what is meant here by the word “acknowledgment,” for upon this question the present case turns? Does it mean an acknowledgment which would amount to a promise to pay and so make a new cause of action, or does it mean *any* acknowledgment? It is a question of considerable importance, because it is the first time that the point has arisen for determination, except in one case, when the Court did not decide it. The numerous cases which have been cited go to the question whether under the statute of James there must be such an acknowledgment as will amount to a promise to pay, and therefore constitute a new cause of action; and there would have been no question as to that if this fifth section had been omitted. But in this fifth section we have the word “acknowledgment,” and the question is what the legislature meant by that word.

Now in the first place we must consider what is the object of any statute of limitation with respect to debts. It is to make time a bar where there is a debt claimed,

upon the ground that after a certain time a person does not retain the means of proving payment of the debt. He may have lost the receipt or other means of proving the payment. It is not passed in order to enable a debtor who really owes a debt to escape payment, but to protect honest debtors. At the same time I do not mean to say that dishonest debtors have not a right to take the benefit of the statute. I refer to the purpose and intention of the legislature. Having provided in the third section of the statute in question for the times within which actions of debt on specialties should be brought, the legislature goes on by the fifth section to provide for the case of an acknowledgment. It does not say an acknowledgment which is to be given by the party liable to the party making the claim, but merely that it must be an acknowledgment by the party liable or his agent. Why am I to put on that language the interpretation that it was to be such an acknowledgment only as would amount to a promise to pay. If the legislature intended that, why is it not inserted here? Indeed, why was this fifth section inserted at all if the only acknowledgment which was to be valid was to be such an acknowledgment as would constitute a promise to pay. Considering that the purpose of the act is to protect the honest debtor, the effect of it is that any acknowledgment made by the debtor, provided it be in writing, will prevent him from saying that because time has run he will not pay the debt, and that conclusion is in accordance with justice. Why should I look upon the word "acknowledgment" as not meaning any acknowledgment, but only a particular kind of acknowledgment. I see no reason for so doing. It is against moral justice that a man who has acknowledged a debt in writing should afterwards say "the twenty years have run, and although I have recently acknowledged

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the debt I will not pay it ;" and I can quite understand that the legislature should put in a clause for the purpose of meeting the case. If you have made no acknowledgment the statute protects you; but if you have acknowledged the debt, you shall not set up the statute; and I think this construction consistent with justice.

This statute, 3 & 4 Will. 4, c. 42, was passed in the year 1833. Only five years before, in 1828, Lord *Tenterden's* Act was passed. That act refers only to the statute of James, and requires the acknowledgment to be in writing. It does not require in express terms that the acknowledgment should be made to the party making the claim; the intention was to leave that point as it stood upon the decisions under the statute of James; and it was unnecessary to introduce words importing that the promise to pay must be made to the persons making the claim. But in the year 1833, shortly before the statute 3 & 4 Will. 4, c. 42, the statute 3 & 4 Will. 4, c. 27 was passed, which enacted limitations with respect to real property; two or three clauses related to money charges on land, but the rest of the statute related to real estate. In that statute the legislature imposed limitations on actions, but made exceptions respecting acknowledgments, and it expressly required the acknowledgments to be given by the party liable to the party claiming. The language of the 40th section relating to money charges on land is that the same shall be barred "unless in the meantime some part of the principal money or interest shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent to the person entitled thereto or his agent;" and section 42 provides that no arrears of rent or interest shall be re-

covered but within six years after the same has become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto by the person by whom the same was payable; and in the 28th section, relating to the bar of an equity of redemption, there is a similar provision. So that in that statute, passed in the same year, the legislature *in pari materia* provides that the acknowledgment which is to have the effect of preventing the bar of the statute must be an acknowledgment given by the person liable to the person entitled. Then comes the 3 & 4 Will. 4, c. 42, which, when speaking of acknowledgment, omits all reference to the acknowledgment being given to the person entitled. And it appears to me, when I find that in the same year the legislature, passing two acts for a similar purpose, in the one makes an exception requiring a special sort of acknowledgment, and in the other requires no particular sort of acknowledgment, that I ought to come to the conclusion that in the latter case any acknowledgment in writing shall be sufficient; especially as such a construction is in accordance with justice.

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In the present case we have as clear an acknowledgment of the debt as can well be. The acknowledgment is not made after decree; it is made before decree in an answer in the suit, and considering that it is an answer which is a deliberate act, more weight must be given to it than if the acknowledgment had been made without deliberation.

[An inquiry at chambers was directed to ascertain the amount of interest due.]

1859:  
January 21.

*Protection  
Order.*

*Payment out of  
Court of Legacy.*

A married woman who has obtained a protection order under the Divorce and Matrimonial Causes Acts, 20 & 21 Vict. c. 85, and 21 & 22 Vict. c. 108, may present a petition without a next friend, and the Court will order the payment out of Court to her of a legacy, to the payment of which she became entitled subsequently to her desertion by her husband.

*Re RAINSDON'S TRUSTS.*

**T**HIS was a petition of *Mary Crew* praying the payment out of Court of a sum of 147*l.* 12*s.* 10*d.* Three per Cent. Annuities under the following circumstances.

*Richard Rainsdon* by his will dated the 17th of February, 1825, gave and bequeathed to his three trustees named in his will a sum of 1,500*l.* New Four per cent. Annuities upon trust to pay the interest on the same to his wife for her life, and after her decease upon trust to pay the interest to his the testator's brother *Edward Rainsdon* and his sister *Elizabeth Hale* in equal shares for their lives and the life of the survivor of them, and after the decease of the survivor of them upon trust to pay, assign and transfer the principal sum of 1,500*l.* among all and every the child and children of his the testator's brothers *William Rainsdon* and *Edward Rainsdon* and of his sisters *Sarah* and *Elizabeth* in equal shares.

The testator died in August, 1826.

*Maria Rainsdon*, the widow of the testator, died in February, 1836.

*Edward Rainsdon*, the brother of the testator, died in February, 1849, and *Elizabeth Hale* in March, 1850.

At the death of *Elizabeth Hale* there were eleven

children of the brothers and sisters of the testator living, of whom the Petitioner *Mary Crew* was one.

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The Petitioner *Mary Crew*, then *Mary Rainsdon*, in 1841 intermarried with *Vincent Crew*, but no settlement was made on the marriage. *Vincent Crew* in 1845 deserted his wife, the Petitioner, and went abroad and was not afterwards heard of by his wife.

In August, 1855, the trustees under the will of *Richard Rainsdon*, the Petitioner being unable in consequence of the absence of her husband *Vincent Crew* to give a proper discharge, paid the share to which she was entitled in the 1,500*l.* into Court under the Trustee Relief Act.

On the 11th of December, 1858, the Petitioner *Mary Crew* obtained from the justices for the county of *Hertford* in petty sessions at *St. Alban's* an order under the provisions of the Divorce and Matrimonial Causes Acts, 1857 (*a*) and 1858 (*b*), protecting any property she might acquire or become entitled to after her desertion from her husband or his creditors, and now filed the present petition without a next friend for the payment of the legacy out of Court to her.

*Mr. J. T. Hopwood* in support of the petition submitted that the Petitioner having obtained a justices' order for protection under the provisions of the Divorce and Matrimonial Causes Acts, and having become entitled to the payment of the legacy on the death

(*a*) 20 & 21 Vict. c. 85, ss. 21, 25, 26.      (*b*) 21 & 22 Vict. c. 108, s. 8.

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of *Elizabeth Hale* subsequently to her desertion by her husband, was entitled to an order for the payment of the legacy to her. No next friend was necessary, as the acts provided that a married woman who has obtained a protection order may sue and be sued as a *feme sole*. He cited *Bathe v. Bank of England*(a); *Re Kingsley*(b).

The VICE-CHANCELLOR made an order according to the prayer of the petition.

(a) 4 Kay &amp; J. 564.

(b) 4 Jur. N. S. 1010.

1859 :  
Feb. 12.

*Practice.*  
*Injunction.*  
*Equitable De-*  
*fence at Law.*

## GOMPERTZ v. POOLEY.

Although where a Defendant at law has pleaded an equitable plea, this Court will not allow him by injunction to remove the cause into equity, yet if a Defendant without pleading his equitable plea at law comes into equity in the first instance and asserts his equitable defence, the Court will interfere by injunction.

THIS was a motion for an injunction to restrain the Defendant from proceeding in bankruptcy or prosecuting an action at law which had been commenced against the Plaintiff.

On the 24th of September, 1858, the Plaintiff being the holder of two promissory notes for 150*l.* each dated the 16th and 23rd of September, 1858, and payable four months after date, paid them to the Defendant.

The Defendant agreed to take the notes without the Plaintiff's endorsement, but on the Plaintiff's written guarantee for payment of the notes in the event of their not being paid at maturity.

The Plaintiff accordingly delivered to the Defendant the following written guarantee with the notes :—

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v.  
POOLEY.

" *London, September 24th, 1858.*

" *Mr. A. G. Pooley.*

" In consideration of your receiving from me this day two bills accepted by Mr. *G. Duysters*, for 150*l.* each, dated September 16th, at four months, and September 23rd, and for which you have given me valuable consideration, I engage in the event of the said bills not being paid at maturity to pay the same.

" Particulars of bills :—

" September 16th, 1858,—150*l.* due January 19th, 1859.

" September 23rd, 1858,—150*l.* due January, 26th, 1859.

" HENRY GOMPERTZ."

It was also agreed, that if the two bills should be paid away without the Defendant's endorsement, or endorsed "without recourse" to the Defendant, or if the Defendant should elect to take the whole risk of payment of the bills on himself, the Plaintiff's written guarantee should be delivered up to him on payment to the Defendant of 40*l.*, or if in respect of only one of the bills, upon payment of 20*l.*

On the 22nd of November, 1858, the Defendant wrote to the Plaintiff, informing him that he had cancelled one half of his guarantee and asking him for his I. O. U. for 20*l.* This the Plaintiff gave the Defendant, and the Defendant retained the amount of the I. O. U. out of monies he had to pay to the Plaintiff.



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The two bills of exchange were not paid at maturity, and the Defendant wrote to the Plaintiff demanding payment of the two sums of 150*l.* pursuant to his guarantee. The Plaintiff in answer to this demand stated his readiness to pay the amount of one of the bills—his guarantee as to the other having been cancelled—and appointed a place to pay the 150*l.*, but the Defendant did not keep the appointment.

On the 1st of February, 1859, the Defendant served the Plaintiff with particulars of demand and notice for payment, pursuant to the 78th section of the Bankrupt Law Consolidation Act, 1849, preliminary to taking proceedings in bankruptcy against the Plaintiff.

On the 2nd of February 1859, a writ was served on the Plaintiff at the suit of the Defendant for 300*l.*, the amount of the two dishonoured bills.

Under these circumstances the Plaintiff filed his bill for an injunction to restrain the proceedings in bankruptcy and the action at law, and charging by his bill that "he is advised and believes his defence to the action so brought against him would be in the nature of an equitable defence."

Mr. *Roxburgh* for the Plaintiff, in support of the motion.

The Plaintiff admits his liability as to one of the bills and offers to pay the 150*l.*, the amount of that bill, to the Defendant.

The Common Law Procedure Act is not imperative

in its terms, but only permissive, and although it allows a Defendant at law to plead an equitable plea, it does not take away his right to come to a Court of Equity instead of pleading that plea at law.

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Mr. *Clement Swanston* for the Defendant (the Plaintiff in the action at law).

The Plaintiff cannot come to this Court. He does not in his bill state that he has no good defence at law, but only that he is advised and believes that his defence would be in the nature of an equitable defence. In the case of *Farebrother v. Welchman* (a), which was decided shortly after the Common Law Procedure Act came into operation, the Court held that where the question in a case is a question of fact, whether the pleas could be proved or not, that without deciding whether the pleas, if proved, afforded either a legal or an equitable defence, the Court will not (having regard to the Common Law Procedure Act) restrain the action. This Court will not allow a Defendant at law to come into equity merely because he prefers having his case tried in a Court of Equity.

The VICE-CHANCELLOR :

I must assume that the 20*l.* on the I. O. U. was paid, and that the Plaintiff's guarantee was cancelled as to one of the bills.

The question is whether, inasmuch as the Defendant is prosecuting a double proceeding, and asserts that

(a) 3 Drew. 122.

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POOLLEY.

he is entitled to the two sums of 150*l.*, for one of which the discharge was given, this Court will grant relief.

I think, although there is an equitable defence at law, the Defendant at law may come to this Court. It has been contended that, as the new Common Law Procedure Act has enabled a Defendant at law to plead an equitable defence, it is not open to him now to come into equity. When the case of *Farebrother v. Welchman* came before me, it appeared to me that the construction the Court ought to put on the act was, that it being allowable for a Defendant at law to plead an equitable plea, if he pleads that equitable plea, the Court of Law will deal with it according to the justice of the case. In that case the Defendant had pleaded the equitable plea, and treated the matter as if he had that defence; and that being the state of the case, and there being no reason why the Court of Law should not deal with the equitable plea, as well as this Court, I thought, in that state of circumstances (issue having been joined), I should not interfere.

But in this case no such reason exists, and the view I take of the matter is, that the legislature intended to make it optional to plead the equitable plea.

We know that there are many cases in which it would be very difficult to plead the equitable plea in such a way that a Court of Law can deal with the question, and it is a matter of great difficulty with a special pleader, whether he can fairly put the equitable defence in such a shape as to enable the Defendant in a Court of Law to have the benefit of that defence.

But the Defendant is not obliged by the terms of the act to plead. The act is only permissive. It does not take away the right a Defendant at law had of coming into a Court of Equity and taking the benefit of that defence, of which he could not avail himself in a Court of Law. It appears to me that where a man has a good equitable defence, to say to him, that he must proceed at law and plead that equitable defence, is in effect to make imperative that which the legislature has made optional.

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This case is clearly distinguishable from the case of *Farebrother v. Welchman* (a), for in that case the Defendant at law had exercised his option and pleaded the equitable plea.

I think therefore the Plaintiff is entitled to an injunction according to the terms of the notice of motion.

(a) 3 Drew. 122.

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1859.  
February 16.

*Statutes.*

The 11 & 12 Vict. c. 63, and the 21 & 22 Vict. c. 98, do not give to a local board of health power to go out of their district to make sewers.

HAYWOOD *v.* LOWNDES.

**T**HIS was a motion for an injunction on behalf of the Plaintiff, an owner of land, in the *Tunstall* district, to restrain the local board of health of *Tunstall* from making a sewer out of the *Tunstall* district passing through the Plaintiff's land; the motion was supported upon two grounds: first, that the local board had no power under the Acts of Parliament, the 11 & 12 Vict. c. 63, and the 21 & 22 Vict. c. 98. 2ndly. That the Defendants were making the sewer in a way prejudicial to the Plaintiff's land, and that it might be made otherwise; and in fact might be made within their district, by purchasing a small tenement, a blacksmith's shop and cottage (*a*).

Mr. *Baily* and Mr. *Jessell* for the motion.

The 43rd, 45th, and 46th sects. of the first act, and the 30th sect. of the second act, are the material sections (*b*). The language of the first act does not, it

(*a*) The judgment turned entirely on the construction of the Acts of Parliament and the facts so far only as was necessary to discuss the construction of the acts.

(*b*) The 43rd sect. of the 11 & 12 Vict. c. 63, enacts—  
“That all sewers, whether existing at the time when this act is applied, or made at any time thereafter, except sewers made by any person or persons for his or their own profit,

or for the profit of proprietors or shareholders, and except sewers made &c., and for the purpose of draining, preserving or improving land under any local or private Act of Parliament, or for the purpose of irrigating land, and sewers under the authority of any commissioners of sewers appointed by the crown, together with all buildings, works, materials and things belonging or appertaining thereto, shall

is true, in terms forbid the local board to travel out of its district; but it is impossible to put any other intelligible construction on it. The very constitution of the "local board" implies that its jurisdiction is confined to its local district. Again, if the act meant that any local board could carry its works out of its district,

vest in, belong to, and be entirely under the management and control of the local board of health."

By the 45th, "The local board of health shall from time to time repair the sewers as may be necessary for effectually draining their district for the purposes of this act; and the said local board may carry any such sewers through, across or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage-way of any street, and, after reasonable notice in writing in that behalf (if upon the report of the surveyor it should appear to be necessary), into, through or under any lands whatsoever, and the said local board may from time to time enlarge, lessen, alter, arch over or otherwise improve all or any of the sewers vested in them as they may deem to have become unnecessary: provided always, that the discontinuance, closing-up or destruction of any sewer shall be so done as not to create a nuisance; and if by reason thereof any person is deprived of the lawful use of any sewer, the said local board

shall provide some other sewer as effectual for his use as the one of which he is so deprived."

By the 46th, "The local board of health shall cause the sewers vested in them by this act to be constructed, covered and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed and emptied; and for the purpose of clearing, cleansing and emptying the same, they may construct and place, either above or under ground, such reservoirs, sluices, engines and other works as may be necessary, and may cause all or any of such sewers to communicate with and be emptied into such places as may be fit and necessary, or to cause the sewage and refuse therefrom to be collected for sale for any purpose whatsoever, but as not to create a nuisance."

Local boards may exercise the powers given by the 46th section of the Public Health Act, 1848, also without their district, if necessary for the purpose of outfall and distribution of sewage, upon making the compensation, to be settled in the manner provided in the 144th section of the Public Health Act, 1848.

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there would be endless confusion, for every board might be working into every surrounding district.

Mr. *Glasse* and Mr. *T. Humphreys* for the Respondents.

The 45th section authorizes us to go through or under any lands whatsoever; no doubt it is not meant that we are recklessly to go into other districts. But here it is absolutely necessary. We must make an outfall for our sewer, and we are expressly authorized by the 30th section of the recent act to go out of our district if necessary for the purpose of outfall. We cannot do that in the district, without knocking down a house.

Mr. *Baily* in reply.

The VICE-CHANCELLOR :

[His Honor commented minutely on the language of the sections cited of the first act, pointing out that the general intention was obviously, in the absence of any specific direction to the contrary, to confine the power and jurisdiction of any given local board to its own district; then that the 43rd section, which vested sewers existing or after made in the local board, could not be construed without absurdity, otherwise than as speaking of sewers within the district; next, that the 46th section, giving powers to repair and make sewers, must, by the same course of reasoning that was applied to the 43rd, mean repairs and making sewers within the district, and that there was nothing in the 46th section which seemed to

extend the powers of the local board to make any sewers out of their own district. His Honor then continued as follows:—I am therefore of opinion that the Defendants have no power given to them by the act of 1848 to make new main drains or sewers out of their district. But then it is suggested that the 30th section of the act of the 21 & 22 Vict. c. 98 gives that power. Now that section only gives a right to exercise the powers of the 46th section of the prior act out of their jurisdiction. But the powers of the 46th section are not to make sewers, but to make reservoirs, sluices, &c. Why the legislature has thought fit to allow local boards to go out of their district for certain other purposes, but not for making sewers, may admit of question. But I am clearly of opinion, that the 46th section of the first act does not give that power, and it is only that section which is extended by the 30th section of the subsequent act. But even if the act did give that power at all, then I should have to consider whether it is *necessary* to go out of the district for the purpose of outfall or distribution of sewage (and here I must observe, that I think clearly the word “and” in the 30th section must be read “or”). But it must be shown that it is *necessary* for the purpose of outfall to go into the Plaintiff’s land.

Now here it is obviously on the evidence not necessary; outfall might be obtained just as well within as without the district. It is said by the Defendants, “If we make the sewer within the district, we shall have to incur the expense of buying a house,” a blacksmith’s shop I believe it is in this case. Well, suppose that is so, that is one of the obligations that the parties are under by the acts. It is not “necessary” for them to go out of the district, because they have to buy a house to remain within it. Then a suggestion is made

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that the works may be carried into effect by deviating a very little into another district, and then returning within their own district. Still it appears to me that that deviation, however convenient, is not "necessary" within the meaning of the act. It appears to me on the whole that there is no power, even if it is necessary, to go out of the district to make new sewers; but if there were, I think here it is not "necessary," and that in any view the Defendants have no such right in this case. I come to the conclusion that the board are deviating from the powers given to them, and the injunction must be granted.

1859:

February 17.

Practice.  
Stay of  
Proceedings.  
Dismissing Bill.

## WALLIS v. WALLIS.

Where a Defendant had resisted the Plaintiff's demand, and the parties were going into evidence, and then the Defendant, having offered to do all the Plaintiff required except to pay his costs, and moving to dismiss without costs: Held, that such a

**T**HIS was a motion by the Defendant, that he executing a conveyance to the Plaintiff of certain premises, and undertaking to abandon all further proceedings in a certain action, the bill might be dismissed *without costs*.

The bill was filed for specific performance of an alleged agreement between the parties for the exchange of certain premises. The Plaintiff under this alleged agreement had entered into possession of the premises he was to have in exchange and had laid out money thereon. motion could not be sustained; but there being dicta which might have misled him, the costs of the motion were made costs in the cause. And *per Curiam*, an application to stay proceedings by a Plaintiff on payment of his costs, or of a Defendant to dismiss the bill without costs, may be sustained under circumstances where the Court can see its way by matter extrinsic to the merits. But on such an application the Court will never go into the merits.

Afterwards disputes arose, and the Defendant repudiating the agreement commenced proceedings in ejectment against the Plaintiff. Thereupon the Plaintiff having from the nature of the agreement, which was partly by letters and partly verbal, no defence at law, filed the bill for specific performance and for an injunction to restrain the action. The suit proceeded at some length, and under a notice of motion for decree both parties were going into evidence, which was not complete. In this state of things the Defendant's solicitor wrote to the Plaintiff's solicitor still denying the right of the Plaintiff, but offering, as he alleged for the sake of peace, to complete the agreement, and to stay all proceedings at law, the Plaintiff to dismiss his bill *without costs*. To the latter part of the offer the Plaintiff objected, and thereupon this motion was made by the Defendant.

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Mr. Glasse and Mr. Nalder for the motion.

There are many cases where the Court will on the application of the Defendant dismiss the bill without costs. The Defendant has done everything that the Plaintiff requires, and the subject of the suit is at an end. Upon the merits we shall show that the suit never ought to have been instituted, and our offer ought to have been accepted—[Counsel then went into the case to show that the bill could not be sustained. They cited *Langham v. The Great Northern Railway Company* (a); *Wright v. Barlow* (b); *Woodard v. Eastern Counties Railway Company* (c)]—and these cases show that

(a) 16 Sim. 173; 1 De G. & Sm. 486. (b) 5 De G. & Simale, 43. (c) 1 Jur. N. S. 899.

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the Court will look at the merits, and if satisfied that the suit was improper, as we say it is, dismiss the bill without costs. At any rate the motion will stand over till the hearing.

*Mr. Bailey and Mr. Elderton, contra.* [The Vice-Chancellor stopped them on the question of going into the merits, being of opinion that the Court would not do so.]

If the cause goes to a hearing this motion is utterly useless. It is a motion to prevent the cause going to a hearing; and it being decided that the Court cannot now go into the merits, whatever it may decide at the hearing, it is obvious that this motion ought not to have been made. It is clear it must be refused, the only question is with or without costs. Now if this motion is wrong, what is there to take it out of the ordinary rule? The cases cited do not decide that the merits can be looked at. They only decide that there may be cases where, if by matters extrinsic and apart from the merits, the subject matter of the suit is gone, the Court may dismiss the bill without costs; as when the bill was right in the origin, on the supposed state of the law, but turns out by subsequent decision to be wrong. Then the Plaintiff may dismiss his bill without paying costs; or if the subject matter of the suit is destroyed by an act not that of the Defendant, then the Defendant may dismiss the bill without paying costs to the Plaintiff. But here the Defendant insists to the last on his right. He may be quite wrong. At any rate he cannot say the Court is to conclude that he is right; and by conceding all we ask, he admits in effect that he is wrong. The motion ought therefore to be refused

at once with costs: *Sutton Harbour Company v. Hitchens* (a).

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Mr. Glasse in reply.

How can the Court be sure of doing complete justice without going into the merits? If on the merits when heard we are right, then this motion is right, for our offer was a proper one.

*Damer v. Portarlington* (b); *Sivell v. Abraham* (c) were also cited.

The VICE-CHANCELLOR :

This question is of some importance, as there may frequently arise cases in which, though the circumstances may not be exactly like these, the question may be of the same nature.

The Defendant says, "I give you all you ask by your bill, and therefore I ask to dismiss your bill without costs."

Now this is perfectly clear; a Defendant may, at any stage of the suit, ask for an order in favor of the Plaintiff, giving him the full relief that he asks, with costs, and staying all further proceedings. That is not disputed. Then there may be cases where a Defendant comes and says to the Plaintiff, "I am ready to give you all the relief you ask, but I will not give you costs," and applies for an order accordingly; and the question is whether a Defendant has a right to do that. Now

(a) 15 Beav. 161.  
(b) 2 Phil. 30.

(c) 8 Beav. 598.

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there are cases in which a Defendant may come and ask for such an order, and others in which he may not. There are cases, when the application is on grounds extrinsic to the merits, where it may be made. But it cannot be made on the ground, that on entering into the merits it would be shown that costs ought not to be paid.

I will mention instances where a party may come to the Court asking to put an end to proceedings without paying costs.

The Court I need not say considers it an object of importance to avoid unnecessary litigation. When the whole object of the suit is got rid of, it is an object with the Court that parties shall not go on litigating and incurring costs, and that a stop shall be put to further expense. On the other hand, if a Defendant has put the Plaintiff improperly to the expense of litigation, it is quite contrary to justice that he should say, "Now I will stop the litigation, but I will not pay the Plaintiff his costs." It is between these two objects that the Court has in such cases to steer.

I will now instance a few of the cases illustrating the rule as to when such an application may and when it may not be made. Suppose, a Plaintiff, having a demand against the Defendant, has insisted on it, and the Defendant disputing his right, the Plaintiff files a bill. If the Defendant then concedes the claim of the Plaintiff, it does not lie in his mouth to say, "Although I have now conceded, I still dispute the justice of your claim, and will not pay costs." He may come of course with an application to put an end to the suit on doing what the Plaintiff requires and payment of costs. So

in such a case it has been held that the Plaintiff may come with an application to stay proceedings on being paid his costs; for, the Defendant having conceded the demand, and having done what the Plaintiff required, it must be assumed that he is wrong; and the Court will make the Defendant pay the costs, not on the merits, into which it does not inquire, but on the footing that the Defendant by submitting admits the justice of the Plaintiff's claim. If a contrary rule were to be followed, might there not be cases of this nature, where the Defendant resists, perfectly well knowing that he is wrong, merely perhaps to stave off the evil day; and what is to prevent him then equally from saying, "I insist that I was right, but for the sake of peace I will yield." The Court not having all the matter before it, could not know whether the case was one of just and fair defence, or of such a defence as that I have referred to.

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Now there are cases in which an application may be made by a Defendant to stay proceedings without costs. Suppose a party, without any dispute having been raised by the Defendant, files a bill. Then the Defendant may well say, "I never disputed your right; why did you not apply to me before you filed a bill. You have filed a bill merely to make costs." In such a case the Court, without going into the merits, would stop the suit without costs, on the ground, extrinsic to the merits, that the Plaintiff ought never to have filed a bill at all.

Again, in such a case as that of *London and North Western Railway Company v. Smith* (a), in which Lord Cottenham had pronounced a decision one way, and on the footing, of that decision, other bills were filed.

(a) 1 M. & Gor. 216.

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In those cases the Plaintiffs were perfectly justified in filing such bills, and if the decision of the Lord Chancellor had not been reversed, they would have obtained decrees. But when a case of the same kind came before Lord *Truro*, and a different decision, in effect overruling Lord *Cottenham*, was come to, what were those Plaintiffs to do? They might no doubt have dismissed their bills on payment of costs; but there would have been great injustice in that. They had been quite right in filing their bills; it was no fault of theirs that Lord *Cottenham* had laid down what was afterwards decided to be erroneous law. Then therefore the Court held that, irrespectively of the merits, the Plaintiff might say, "We find now we are wrong, and let proceedings be staid without payment of costs."

I do not mention these as all the kinds of cases that might occur; I only refer to them by way of illustration.

Next, let me consider what would be the effect if it were held that when an application is made to stay proceedings without costs, the Court could go into the merits.

Suppose the application were made immediately after filing the bill, and no other step taken, why should the Defendant be entitled to say, "Try now the merits of the case, and stop the suit without costs." Is the bill to be taken to be true, or are there to be affidavits? How could the Court decide without evidence? In other words, you must go into evidence to try on that motion what should be tried at the hearing of the cause.

Suppose the application to be made after answer, which may be read on the question of costs, and the Defendant says, "Stop the suit upon my answer;" that answer may be full of misrepresentation, which the Plaintiff may entirely rebut by evidence. In fact in any stage of the suit you must go into all the evidence upon the merits, for determining the question of costs, that would have to be gone into at the hearing.

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Now here the Defendant resists the Plaintiff's demand; the Plaintiff has set his cause down on motion for decree, and filed affidavits. Why has he done so? because the Defendant resisted his claim; the Defendant is in the act of cross-examining the Plaintiff's witnesses; he has not yet himself for the purpose of the hearing gone into evidence; but there have been on a motion affidavits filed by him which he gives notice to read on this motion; these it is true he may or may not read at the hearing; however that may be, the evidence is proceeding and is incomplete, and if I am now to go into the merits I must allow each party to go into all the evidence he desires to bring forward. And what is the ground for doing so, when here is a motion for a decree, on which all the evidence will be gone into at no greater expense than would be incurred if it were now gone into.

It appears to me that in any stage of the cause it would be contrary to principle, and contrary I think even to the dicta that have been referred to, to allow that to be done.

[His Honor then proceeded to comment on the dicta of Lord *Langdale* in *Sivell v. Abraham*, showing that in that case the sole object of the suit was to compel the



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vendor to obtain the concurrence of the heir at law in conveying to the Plaintiff. His Honor referred to the intimation of the Court that the Plaintiff ought to have come with some application, observing that the only application that in his view the Plaintiff could have made would be to stay proceedings on being paid his costs, on the footing that the concurrence of the Defendant in his demand was an admission of the Plaintiff's right; but his Honor observed also, that prior to that case there had been none in which such an application had been made. He then proceeded to comment on the judgment, pointing out that it did not appear to be perfectly consistent throughout, and that having regard to some portions of it, one would not have expected that Lord *Langdale* would have taken the course that he did, of making the Defendant pay the costs. His Honor then continued as follows :]—

I cannot help thinking that Lord *Langdale* meant, it would have been right for the Plaintiff to have made an application on the ground, that irrespective of the merits the Defendant admitted the Plaintiff to be right, and that the application should have been made to stay proceedings on payment of the Plaintiff's costs. And I may observe that Lord *Langdale* by giving the Plaintiff his costs of suit up to the time of the Defendant's proposition, in effect affirmed the proposition that the Defendant had no right to apply to dismiss the bill without costs.

It does not appear to me on the whole that any of the cases establish the proposition that on an application of this nature to stay proceedings, either by a Defendant or by a Plaintiff, the Court can go into the merits. Take the *Sutton Harbour Case*. It appears to me to support the

view I take, viz. that a party may come with an application to stay, but not to go into the merits. That case is a clear authority that the Court will not go into the merits on such a motion as this. *Langham v. The Great Northern Railway Company* is to the same effect.

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Under these circumstances, I am to consider what I am to do. I think it clear I must refuse the motion; the only question is whether with or without costs. Now I think there are in the cases cited some indications of opinion, no positive decision, but dicta tending to show an inclination of opinion which might lead the Defendant to consider that such an application was right. Under these circumstances I think that though I must refuse the motion, I ought to direct the costs of the Plaintiff of this motion to be costs in the cause. Then, if he is right at the hearing, he will get these costs; if he is wrong, the Defendant will have no costs of the motion to pay.

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1859:  
February 22.

*Legacy.*  
*Debt.*  
*Satisfaction.*

### HASSELL v. HAWKINS.

Where a debtor gives a legacy to his creditor, the Court will lay hold of minute discrepancies between the debt and the thing given, to rebut *satisfaction*. Thus, when the debtor gave 400*l.* to a creditor to whom he owed 145*l.*, and gave him also other large benefits by way of life estates, and remainders in real and personal estate, and expressly directed his debts and legacies to be paid, it was held that the debt was not satisfied by the legacy or any others of the benefits given.

**T**HIS was a special case, in which a creditor of the testator in the cause was the Plaintiff, and the executors of the testator were the Defendants, and it was filed for the sole purpose of determining whether the debt due to the testator's estate was satisfied by a legacy and certain other benefits given by the will to the Plaintiff. The material expressions in the will appear sufficiently by the statements and arguments, and in the judgment.

The facts were as follows:—the Plaintiff had paid several small debts of the testator at his request, amounting to about 145*l.*, and it was admitted that this was a debt due to the Plaintiff at the time when the will was made. By his will the testator bequeathed to the Plaintiff a legacy of 400*l.*; he devised and bequeathed to him also certain interests in real and personal estate, of very considerable value, but such interests were either life estates, or estates in remainder; and some were contingent. The testator expressly directed his debts to be paid, and also expressly directed his legacies to be paid within twelve months.

*Mr. W. W. Cooper* for the Plaintiff.

*Primâ facie*, no doubt, if there is a debt due to a testator, and a simple gift of a legacy to him of the same or of larger amount, that satisfies the debt. But the Court lays hold of minute circumstances to rebut satisfaction; a direction to pay debts rebuts it. So if

the legacy is not payable at the same time that the debt would be payable, that rebuts it; *Nicholls v. Judson* (a); *Matthews v. Matthews* (b); *Clarke v. Sewell* (c); *Haynes v. Mico* (d); *Adams v. Lavender* (e).

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Again, the legacy and debt must be of the same nature and for the same estate or interest; *Byde v. Byde* (f); *Forsight v. Grant* (g); *Eastwood v. Vinke* (h). He cited also *Alleyn v. Alleyn* (i); *Bartlett v. Gillard* (k); *Rowe v. Rowe* (l); *Deveas v. Pontet* (m); *Jefferies v. Michell* (n); *Hales v. Darell* (o); *Wood v. Wood* (p).

Here every one of the circumstances, each of which the Court has relied on in the authorities, exists. The legacy is not payable for twelve months, while the debt is immediately payable. The gifts, other than the legacy, are different from the debt in nature and quantity of estate, and there is a clear direction to pay debts.

*Mr. Tripp* for the executors, who desired not to press the point, but only to have the direction of the Court.

The Court has never considered itself bound by any particular circumstances, but looks at the whole will to see the general intention of the testator. The legacy here is not, as in the cases cited not to be paid *until* twelve months have expired; it is to be paid not later than that; but it may be paid at once. In some of the cases cited, the legacy was to a servant, and that dis-

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| (a) 2 Atk. 300.       | (i) 2 Ves. sen. 37.     |
| (b) 2 Ves. sen. 635.  | (k) 3 Russ. 149.        |
| (c) 3 Atk. 96.        | (l) 2 De Gex & Sm. 295. |
| (d) 1 Br. C C. 129.   | (m) 1 Cox, 188.         |
| (e) 1 M'Lel. & Y. 41. | (n) 20 Beav. 15.        |
| (f) 1 Cox, 48.        | (o) 3 Beav. 324.        |
| (g) 1 Ves. jun. 297.  | (p) 7 Beav. 183.        |
| (h) 2 P. Wms. 613.    |                         |

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tinguished them. So in some of them the debt was under settlements and bonds; that is different from a simple contract debt.

The mere direction for payment does not always operate to rebut satisfaction: *Wathen v. Smith* (a); *Wallace v. Pomfret* (b); *Edmunds v. Lowe* (c).

Here there are besides the legacy numerous benefits to the Plaintiff, amounting to a very large value. It is clear that the testator intended to treat the debt as satisfied. He could not have intended that a trifling debt of 145*l.* should be claimed by a person to whom he was bequeathing thousands.

Mr. Cooper was not called on to reply.

The VICE-CHANCELLOR:

I have no doubt about this case. Long ago a false principle was established, viz., that if a man owes a debt, and then gives a legacy to his creditor, the legacy is a satisfaction of the debt; that the creditor cannot legally have both the debt and the legacy. That principle being established, successive judges have said they cannot alter it. But what they have done is to rely on the minutest shade of difference to escape from that false principle.

It would be more satisfactory to be able to decide that *primâ facie*, unless a testator shows a contrary intention, he should be held, if he owes a debt and gives a legacy, to mean that he or his estate should pay the

(a) 4 Mad. 236.

(b) 11 Ves. 542.

(c) 3 Kay & John. 318.

debt and also the legacy. If you find that the testator in his will expresses an intention that what he gives is to satisfy the debt, then it is not a question of satisfaction but of election. But in the absence of such expressed intention, when a man owes a debt, all that he has to give is what remains after payment of his debt. It is only the residue, after paying the debt, that is his to give; so that, if he gives a legacy, he must be held to mean that his creditors should be first paid, and then it will be seen what remains, and out of that he gives a legacy.

In this case there is every reason why the general rule should not prevail; there are a number of circumstances, which following the example of preceding judges, I shall hold take this case out of the rule. In cases of this kind, wherever I find any discrepancy between the debt and the thing given, I will follow the doctrine laid down by the authorities, and say that is a reason for departing from the general false principle.

Now it appears to me that in this case there is every one of the circumstances that have been relied upon in the cases. And in particular, there is an express direction to pay the debts and then a direction to pay the legacies. How can that direction be followed out without paying the debts as well as the legacies? To do otherwise would be contrary to the very terms of the will itself. I think therefore there is quite sufficient to say the Plaintiff is entitled.

The Defendant was ordered to pay the costs, and to have them and his own costs out of the estate.

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1859 :  
Feb. 26 and 28.

*Evidence.*

LAWRENCE v. MAULE.

Where, upon an issue between parties, the testimony of a witness since deceased has been received, which either of those parties might use against the other, that evidence may be used between the same parties in any subsequent proceedings on the same issue.

Upon a petition for the re-transfer of Stock, under 56 Geo. 3, c. 60, service on the Commissioners and also on the Attorney-General is required by the act. The Court will presume at the hearing of the petition, that the Attorney-General represents not only the Commissioners and the Crown as *parens patriæ*, but also the Crown in its beneficial capacity.

Therefore, where testimony of a witness since deceased was received upon a petition under that act, that testimony is receivable in a subsequent proceeding against an administrator nominated by the Crown, and the Crown by a party to the former proceedings or his representatives.

THIS was a summons adjourned from chambers on the exceptions of the claimants *Bryan* and wife to the Master's report of the 3rd of March, 1858. The question was, whether or not certain affidavits should be received as evidence in the cause.

The affidavits in question had been filed under the following circumstances.

*John Lawrence*, the intestate in the cause, having been born in *England* went to *America* in 1799. He resided at *Norfolk*, in the State of *Virginia*, and carried on business with Messrs. *Sparling* and *Bolden*, of *Liverpool*, under the firm of *Sparling, Bolden* and *Lawrence*. In consequence of the death of *Bolden*, one of the partners, a suit of *Welding* and *Bolden* was instituted to wind up the partnership, and a large sum of stock and cash was paid into Court on the partnership account, and a large sum as the share of the intestate *John Lawrence* was carried over to his separate account in the cause. Pending that suit, and in December, 1814, the intestate *John Lawrence* died in

*America*, and no person having administered to his estate in *England*, and his next of kin not being known, the Plaintiffs in the suit of *Wilding* and *Bolden* advertised for the intestate's next of kin.

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In consequence of this advertisement several persons sent in claims, and among others *Diana Kemp*, *Matthew Wilkinson* and *Benjamin Wilkinson* claimed to be the intestate's next of kin, and in May, 1828, they obtained letters of administration to the intestate's estate, and obtained an order for the payment out of Court of the stock and cash standing in Court to the separate account of the intestate.

After this payment and transfer two adverse claimants named *John Baker* and *Betty* his wife, in right of the wife, as alleged next of kin of the intestate, instituted the suit of *Baker v. Kemp* against *Diana Kemp* and *M. and B. Wilkinson*, and presented a petition to the Court raising the question in that suit, and also in *Wilding v. Bolden*, whether *Diana Kemp* and the *Wilkinsons* were or were not next of kin of the intestate. The petition was dismissed with costs, and it was in opposition to this petition that the nine affidavits entitled in these suits were filed.

In August, 1828, *Diana Kemp* and *M. and B. Wilkinson*, as administrators, petitioned the Court of Chancery under the provisions of the 56 Geo. 3, c. 60, for the transfer to them of a sum of stock standing in the name of the intestate, and which had been transferred to the Commissioners for the Reduction of the National Debt.

Upon the petition the Attorney-General appeared



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for the Commissioners and also for the Crown, and an order of reference was made to the Master to inquire who were beneficially entitled to the stock. Under this reference *Diana Kemp* and *M. and B. Wilkinson* carried into the Master's office a state of facts, claiming to be beneficially entitled, and it was in support of that state of facts that the nineteen affidavits in *Re Lawrence* were filed.

In consequence of proceedings in the Prerogative Court for revoking the letters of administration which had been granted to *Diana Kemp* and *M. and B. Wilkinson*, no report was made upon the reference in *Re Lawrence*. The letters of administration to *Diana Kemp* and *M. and B. Wilkinson* were revoked, and letters of administration were afterwards granted to *Mr. Maule* as nominee of the Crown.

The present suit was subsequently instituted by *William Lawrence* and others against *Mr. Maule* the nominee of the Crown, claiming to be the next of kin of the intestate; and in January, 1838, an order of reference was made to the Master to inquire who were the next of kin of the intestate.

In one of the claims carried in before the Master under this inquiry, but which proved unsuccessful, an affidavit of *Sarah Hemingsley* was filed on the 31st of October, 1843.

Among other claimants under this inquiry were *John Bryan* and *Susannah* his wife, in right of his wife, as legal representative of *Matthew Wilkinson*; and in support of their claim they tendered as evidence before the Master (*inter alia*) the nine affidavits made in the cause

of *Wilding v. Bolden*, the nineteen affidavits made in *Re Lawrence*, and the affidavit of *Sarah Hemingsley*, of the 31st of October, 1843, made in the suit of *Lawrence v. Maule*.

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The Master refused to receive these affidavits, and by his report made in March, 1858, disallowed the claim and evidence. To that report the claimants excepted. These exceptions were adjourned to chambers, and now came on by adjournment from chambers to be argued before the Court.

The parties who had made the twenty-nine affidavits were dead.

Mr. *Anderson* and Mr. *Toulmin* for the exceptants.

The Master ought to have received these affidavits in evidence.

With regard to the nine affidavits.

These had been filed on behalf of *Diana Kemp* and *M. and B. Wilkinson* as administratrix and administrators of the intestate *John Lawrence* in opposition to the petition of *Baker* and his wife. Mr. *Maule* the nominee of the Crown is now the administrator of the same intestate, and, as regards third parties, stands just in the same position as such administrator as *Diana Kemp* and *M. and B. Wilkinson* stood; and therefore the affidavits, having being so filed in that cause, may be used by any other claimants against the administrator.

With regard to the nineteen affidavits filed in *Re Lawrence*.

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These affidavits were filed in support of a claim to a sum of stock which had been transferred to the Commissioners of the National Debt. It must be presumed that in *Re Lawrence* the Attorney-General appeared as representing the rights of the Crown, and also for the Commissioners of the National Debt. In *Re Bigg* (a) the counsel for the Attorney-General raised a question independent of that raised on behalf of the Commissioners; and in *Ex parte Ram* (b) the Attorney-General appeared on behalf of the Crown, as well as for the Commissioners for the Reduction of the National Debt.

In the present suit the Attorney-General appears for the administrator, the nominee of the Crown, who is a trustee for the Crown. This has been already decided in *Kane v. Reynolds* (c), and *Edgar v. Reynolds* (d). So that the Crown is beneficially interested both in *Re Lawrence* and in the present suit, and being present in the same interest on both occasions, these affidavits being evidence on the former occasion against the Crown, must also be evidence against it in the present suit.

With regard to the affidavit of *Sarah Hemingsley* sworn in this suit.

It appears that this affidavit was rejected by the Master on the ground that it was not brought in on behalf of *Bryan* and wife. It was however filed in this suit, and although filed in respect of a claim that failed it was evidence against the Crown, and the present claimants finding it in the Master's office have a right to use it against the Crown on the present question. In *Trezevant v. Frazer*, which is cited in *Gresley on Evi-*

(a) 1 Y. & C. Ex. 245.

(b) 3 My. & Cr. 25.

(c) 4 De G., M. & G. 565.

(d) 4 Drew. 269.

dence in *Equity* (a), where the question was whether all the Defendants could argue upon evidence produced by one, Sir C. Pepys, Master of the Rolls (afterwards Lord Cottenham), said, "Not to allow this would lead to a most extraordinary conclusion, that they would all be obliged to send in the same state of facts, to examine the same witnesses, and to produce the same evidence. Any of them may take exceptions, and in supporting them may show the circumstances under which the Master came to his conclusion."

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Mr. Wickens (for the Attorney-General) appeared for the administrator and also for the Crown.

[His Honor said he would relieve the Defendant from answering as to the nine affidavits.]

With regard to the nineteen affidavits.

Both parties agree that the proceedings in *Re Lawrence*, and in the present suit, are as to the same issue, namely, as to who are the next of kin of the intestate. But they are not between the same parties. The question is, whether the Attorney-General appeared in *Re Lawrence* for the Crown in its beneficial interest. In *Re Lawrence* the Attorney-General appeared for the Commissioners of the National Debt, and in that case the Crown was represented in its official capacity as *parens patriæ*, but not as a beneficiary, such as it would in the case of a person dying without next of kin.

But even admitting that the beneficial interest of the Crown was represented in *Re Lawrence*, this is an administration suit by the Plaintiffs, who are persons

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not represented in interest by the present claimants. Their interests are in fact adverse, and it does not follow, even if the Plaintiffs might have used these nineteen affidavits against the Crown, that *Bryan* and his wife, who have a case entirely different from the Plaintiffs, can have the same right.

The nineteen affidavits were used by the then administrators (whose letters of administration have been revoked on the ground that they were not next of kin) as evidence of their title, and the present claimants were not represented in that matter, and therefore as between them and the Crown the evidence is not between the same parties. Moreover this evidence was given by way of affidavit under the old practice when there was no power to cross-examine. The witnesses are now dead, and we cannot now cross-examine them although the rules of evidence now in force would entitle the Crown to do so; and for that reason these nineteen affidavits are not admissible.

With regard to the affidavit of *Sarah Hemingsley* sworn in this cause.

This affidavit was made upon a claim, which failed, and it is the practice in the Master's office when a claim is rejected that the claim and all the evidence relating to it are together by such rejection thrown out of the office. The case is analogous to that of a Defendant to a suit who has brought in evidence and then been dismissed with costs.

Moreover the claim in support of which this affidavit was filed and the present are not between the same

parties, and therefore the present claimants cannot avail themselves of this affidavit.

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For the Crown it is submitted therefore.

First. That the beneficial interest in the Crown was not represented in *Re Lawrence*.

Second. That if it was represented to any extent in that case, that would not make the evidence given on that occasion evidence in an inquiry like the present, and the like reason excludes Mrs. *Hemingsley's* affidavit.

Third. The manner in which the evidence was taken, and the witnesses being dead, these affidavits cannot be evidence now.

Mr. *Anderson* in reply.

The VICE-CHANCELLOR :

It appears to me that with regard to the three classes of affidavits I must admit the nineteen which were filed in *Re Lawrence*, and reject the nine made in the suit of *Wilding v. Bolden*, and the one affidavit made in this present suit of *Lawrence* and *Maule*, for the following reasons :—

The general rule with regard to the admission of evidence is, that where an issue has been raised between certain parties, and evidence has been adduced upon that issue by one of those parties which could be used by him as against the other party, and in a subsequent proceeding the same issue is raised between the same

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parties, and the witness who gave the evidence in the former proceeding has died, the Court will admit the evidence given by the deceased witness in the former as evidence in the subsequent proceeding. But the evidence is not admissible unless the issue is the same, and the parties are the same, in both proceedings.

What is the issue in this case? It is an issue whether *Matthew Wilkinson* was next of kin or one of the next of kin of *John Lawrence*, the intestate, at the time of his death. It is an issue in the strict sense of the term, because it admits of an affirmation on the one side and of a denial on the other.

Then what was the issue which was raised in *Re Lawrence* in the year 1828, in which the nineteen affidavits were filed. That was a proceeding under the statute 56 Geo. 3, c. 60, for the purpose of getting back from the National Debt Commissioners a sum of consols which had stood in the name of the intestate at the time of his death, and which had under the provisions of that act been transferred to the commissioners.

That Act of Parliament authorizes applications to be made by the persons claiming to be entitled. Two persons named *Wilkinson*, of whom the said *Matthew Wilkinson* was one, and a person named *Diana Kemp*, who had obtained letters of administration to the intestate's estate, presented a petition under the act, asking that the sum of 3,000*l.*, which had belonged to the intestate, and which had been transferred into the names of the commissioners, might be re-transferred to them, they claiming to be entitled thereto as his next of kin. Upon that petition an order was made

for an inquiry as to what stock was standing in the name of the intestate, and as to the persons who were beneficially entitled to the same, and in the course of the proceedings upon that order the nineteen affidavits were made. So far as regards *Matthew Wilkinson* being one of the next of kin, there was the same issue on that inquiry as there is in the present proceeding; for in both we have an affirmation on the one side that *Matthew Wilkinson* was one of the next of kin, which is denied on the other.

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The next question is, are the parties to that issue the same as the parties to the present issue? The parties now before the Court are the representatives of *Matthew Wilkinson*, who assert that he was the intestate's next of kin, and the intestate's legal personal representative. That legal personal representative is Mr. *Maule*, who is the nominee of the Crown, to whom administration was granted upon the footing, that, as it did not appear that there were any next of kin, the Crown was beneficially entitled to the estate; and it was upon that footing only that Mr. *Maule* was constituted the legal personal representative. The grant of administration to the nominee of the Crown always presents a *prima facie* case of there being no next of kin; and the nominee is trustee for the Crown.

I adhere to what I held in the case of *Edgar v. Reynolds*, that where the grant of administration is made to the nominee of the Crown, that nominee is as regards third persons liable like any other legal personal representative to the claims of all parties. In that case I made the legal personal representative liable for interest on balances. But as between the



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administrator and the Crown the matter is different, for there the administrator could not be heard to say that he is not trustee for the Crown. It was indeed unnecessary to have upon the record any person representing the Crown; but upon the proceedings at chambers I should have required, as I have now required, the Crown to be represented as being beneficially entitled. I must assume that in the present case the issue is between the claimant, insisting that *Matthew Wilkinson* was next of kin, and the Crown insisting that he was not.

Who were the parties in *Re Lawrence*? The act 56 Geo. 3, c. 60 requires that when a petition is presented under that act there shall be service on the commissioners and on the Attorney-General, but the act does not go on to say in what capacity the Attorney-General must be served. *Primâ facie* the service on the commissioners would be sufficient protection to the public, in so far as the public is interested. But the Attorney-General is required to be also served. Now I presume that when the Attorney-General is required to be served it is that he may represent the Crown. The Attorney-General may represent the Crown when the Crown has an interest that is not a public interest. The Crown may have a beneficial or pecuniary interest (if I may so call it) with reference to the disposition of intestates' estates. Although the Act of Parliament does not say in what capacity the Attorney-General is to be served, yet when he comes here he must represent the Crown in every interest. It is true the public interest may conflict with the private interest of the Crown; but when that case arises arrangements are made for different counsel to represent the Crown in

those conflicting interests. It is said that the Attorney-General when served appears by the same counsel as the Commissioners of the National Debt, but that is because the two have the same interest. It appears to me that the Crown was before the Court in *Re Lawrence* in the same capacity in which it is before me now in this case, and therefore that not only the issue is the same, but the parties also are the same in both proceedings.

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When the affidavits in question were brought in, the practice in the Master's office was, at one of the preliminary meetings to determine in what way the evidence should be taken, whether by interrogatories, affidavit or *vivâ voce*; and if neither of the parties objected the Master directed the evidence to be taken by affidavits, and all those affidavits were good evidence with regard to the parties to that proceeding. Now a change has taken place, for although all the proceedings in the Judge's Chambers are by affidavit, there is now a power to cross-examine witnesses. If the evidence was good at the time it was given, it appears to me that the subsequent change in the practice does not make the evidence bad.

I must therefore admit the nineteen affidavits filed in *Re Lawrence*.

With regard to the affidavits filed in the suit of *Wilding v. Boldin*. There was in that case neither the same issue nor the same parties as in the present, and I must therefore reject them.

With regard to the one affidavit filed in the present

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cause. *Primâ facie*, evidence in a cause must be received as against all the parties. But at the hearing of the cause there was an inquiry as to the next of kin. When *A.* comes in as a claimant, there is an issue between him and the Crown, and when *B.* comes in there is an issue between him and the Crown. But these two issues are different issues and between different parties. As between *A.* and the Crown, if *A.* files an affidavit, the Crown may find it not worth while to answer it, as *A.* may have beaten himself on his own showing. Shall *B.* then have a right to say that he will use that affidavit upon a different issue between different parties? It appears to me that I must reject this affidavit on the same principle on which I admitted the nineteen affidavits.

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1859.  
March 7.

*Privilege.  
Confidential  
Communications.  
Scotch Solicitor  
and Law Agent.*

LAWRENCE v. CAMPBELL.

**T**HIS was a summons adjourned from chambers.

The Plaintiff had obtained the usual order for production of all documents in the possession of the Defendants *Alexander Robertson* and *Thomas Barber Simson*. These Defendants filed an affidavit containing a schedule of documents divided into two parts and objected to produce the documents set forth in the second part of the schedule on the ground of privilege.

The same privilege with respect to the non-production of confidential communications as between an English solicitor and his client, is extended to like communications as between a Scotch solicitor and law agent practising in London (though not admitted an English solicitor) and his client in Scotland.

The object of the suit was to enforce payment of the sum of 173*l.* 5*s.* 11*d.* alleged to have been remitted by the Defendant *Campbell* to the Defendants Messrs. *Robertson* and *Simson* in trust for the Plaintiff. It appeared from the statements in the bill that Mr. *Campbell*, the principal Defendant, was residing at *Jura House* in the island of *Jura* in *Scotland*, and that Messrs. *Robertson* and *Simson* were his agents and were carrying on business at *Westminster* as Scotch solicitors and law agents, and that Messrs. *Robertson* and *Simson* were not English attornies or solicitors, but the Plaintiff alleged that the said Defendants *Robertson* and *Simson* were acting in the matter as the ordinary agents and as trustees for the Defendant *Campbell* and for the Plaintiff.

The Plaintiff by his bill alleged that the correspondence between the Defendant *Campbell* and the De-

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defendants *Robertson* and *Simson* would make out a trust for the Plaintiff and that he was entitled to the production of that correspondence.

The Defendants Messrs. *Robertson* and *Simson* by their answer admitted that they had received from Mr. *Campbell* a sum of 300*l.* which would according to certain conditions not fulfilled have been applicable to the payment of the Plaintiff's demand, but they denied that they held it in trust for the Plaintiff.

The Plaintiff took out a summons at chambers for the production of the correspondence between the Defendant *Campbell* and Messrs. *Robertson* and *Simson*.

The Defendants by their answer stated :—

“ We were duly admitted solicitors before the courts of law in *Scotland* and practised there as such. For several years we have been and now are resident and practising in *London* as Scotch solicitors and law agents, and in our capacity as such we were professionally employed by *Thomas Rankin of Edinburgh* the solicitor for the Defendant *R. D. Campbell* and by the Defendant *R. D. Campbell* in the transactions in the Plaintiff's bill mentioned, and we acted in such professional capacity and not as ordinary agents and trustees of the Defendant *R. D. Campbell* as in the said bill untruly alleged, and the documents set forth in the second part of the said schedule to the said affidavit consist of letters written to and received by us from the Defendant *R. D. Campbell* and of copies of letters written by us to the Defendant *R. D. Campbell*, and the said letters are communications which passed between us and the De-


fendant *R. D. Campbell* in the cause and for the purpose of the said employment and are of a professional and confidential nature, and we object to produce the same or make any further discovery thereof, inasmuch as the said letters and copies of letters were written and received by us confidentially in our professional capacity as aforesaid."

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Mr. *Anderson* and Mr. *Rogers* for the Plaintiff contended. Firstly. That the rule respecting privileged documents did not apply to this case; that the Defendants, Messrs. *Robertson* and *Simson* were mere strangers in this country, and that the Court could no more recognize their *status* as solicitors than if they had been solicitors from *New York* or any foreign state, and that they must be deemed ordinary agents. Secondly. That the documents in question containing as they did the *res gestæ* of the litigation would not in *Scotland* have been privileged: *Kyd v. Bunyan* (a). Thirdly. That the documents did not relate to legal matters but only to such as might as well have been transacted by an ordinary agent, and were therefore not privileged.

Mr. *Glasse* and Mr. *G. W. Collins* for the Defendants, Messrs. *Robertson* and *Simson*, insisted that the construction of the rule contended for on behalf of the Plaintiff was far too narrow. That the Court would no doubt, if a proper case were to arise, recognize the relation in the case put of a foreign solicitor coming to this country on professional business. But that was

(a) 5 Court of Sessions Cases, 2nd Ser. 193.

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not necessary for the Defendant's argument. For Messrs. *Robertson* and *Simson* were Scotch solicitors and practitioners in *London* and conducting suits in the House of Lords and Privy Council where, no doubt, their *status* as solicitors would be fully recognized and acted on. That the distinction as to *res gestæ* did not exist in *England* where the courts would be governed by their own rules as to the admission of evidence. That the transactions referred to were in the ordinary professional capacity and were as stated in the affidavit, which must be taken to be true on this motion. That the motion for production was resisted on principle. That if the privilege did not extend to Scotch solicitors and parliamentary agents they would be unable to carry on their business in *London*.

Mr. *Anderson* in reply.

The following cases were cited:—*Bunbury v. Bunbury*(a); *Calley v. Richards*(b); *Steele v. Stewart*(c); *Herring v. Clobery*(d); *Cleave v. Jones*(e); *Cromack v. Heathcote*(f); *Greenough v. Gaskell*(g); *Enthoven v. Cobb*(h); *Hawkins v. Gathercole*(i); *Carpmael v. Powis*(k); *Glyn v. Caulfield*(l); *Follet v. Jefferyes*(m); *Beadon v. King*(n); *Moore v. Terrell*(o); *Pearse v. Pearse*(p); *Gainsford v. Grammar*(q).

- (a) 2 Beav. 173.
- (b) 19 Beav. 401.
- (c) 1 Phil. 471.
- (d) 1 Phil. 91.
- (e) 7 Exch. 421.
- (f) 2 Brod. & B. 4.
- (g) 1 Myl. & K. 98.
- (h) 2 De G., M. & G. 632.
- (i) 1 Sim. N. S. 150.

- (k) 1 Phil. 687; S. C., 9 Beav. 16.
- (l) 3 M. & G. 463.
- (m) 13 Jur. 465.
- (n) 1b. 550.
- (o) 4 B. & Ad. 876.
- (p) 1 De G. & Sm. 25.
- (q) 2 Camp. 9.

The VICE-CHANCELLOR :

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I am of opinion that the Defendants are entitled to the privilege they claim and to refuse to produce the documents, the production of which the Plaintiff seeks to enforce. The Defendants say the documents are in their possession as the legal advisers of Mr. *Campbell*, and that therefore they ought not to be compelled to produce them. By their answer they state that they have been admitted as solicitors before the Courts of Law in *Scotland*, that they are practising in *London* as Scotch solicitors and Law agents, and that the letters were written and received by them confidentially and in their professional capacity. Here then is a very distinct statement, which would, if these gentlemen had been English solicitors, have entitled them to protection from production. These letters consist of two series—those written by these gentlemen to Mr. *Campbell*, and those written by Mr. *Campbell* to them ; and I think that there can be no question but that they should not be produced. They are professional communications made as between a solicitor—though a Scotch solicitor—and his client Mr. *Campbell*. The question is new in specie, but the cases have settled the general principle, and I think that principle must apply to this case. The general principle is founded upon this, that the exigencies of mankind require that in matters of business, which may lead to litigation, men should be enabled to communicate freely with their professional advisers, and their communications should be held confidential and sacred, and that no one should have a right to their production. The reason is that the exigencies of mankind require it ; and no mischief arises from it, as it does not in any way break in upon the principle that Courts of Equity may




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require the production of all documents which will tend to prove the case before them.

As regards an English solicitor it is not now necessary as it formerly was for the purpose of obtaining production that the communications should be made either during or relating to an actual or even to an expected litigation. It is sufficient if they pass as professional communications in a professional capacity. No doubt as a general rule this is confined to professional legal advisers, but at the same time it is subject to some exceptions. But it does not appear to me that this case is in the nature of an exception. It is rather a corollary to the general rule than an exception. The reason why the rule is generally confined to professional legal advisers is, that the exigencies of mankind require it, but do not require that they should have that species of communication with persons who are not in that capacity.

In the present case here is a gentleman (Mr. Campbell) residing in *Scotland* who has undertaken certain matters relating to the debts of the Defendant Meiklam who resided in *England* when and where the debts were contracted. He has undertaken a certain amount of duty and responsibility and employs these gentlemen, practising as Scotch lawyers and agents in *London*. Suppose a Scotch solicitor or writer to the signet at *Edinburgh* comes across the border, and being found in *England* is required to produce communications made to him professionally in *Scotland*. No one would contend that he could be obliged to do so. If a Scotchman consults a Scotch solicitor in *Scotland* the privilege is allowed. What difference does it make in principle that the Scotch solicitor, instead of being resi-

dent in *Scotland*, resides in this country for the purpose of conducting the business of Scotch clients? Is it not right that they should have the same facilities for consulting their solicitors in this country as in *Scotland*? It might be that an English solicitor would not answer the purpose so well.

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The question really comes to this. If a Scotchman has occasion to communicate with a professional adviser in this country, must he consult an English solicitor or may he not employ a Scotch solicitor? It appears to me that the same principle that would justify an Englishman consulting his English solicitor would justify a Scotchman consulting a Scotch solicitor.

A question has been raised as to whether the privilege in the present case is an English or a Scotch privilege; but sitting in an English Court, I can only apply the English rule as to privilege, and I think that the English rule as to privilege applies to a Scotch solicitor and law agent practising in *London*, and therefore the letters in question are privileged from production.

As this question, though old in principle, is new in specie, the costs must be costs in the cause.

1859.  
February  
and March 23.

*Sale.*  
*Sheriff.*  
*Fraudulent Sale.*  
*Interpleader.*  
*Execution*  
*Creditor.*  
*Costs.*

# HALE v. SALOON OMNIBUS COMPANY AND OTHERS.

THIS was an interpleader suit; the bill being filed by the sheriff under the following circumstances:—

A pawnbroker bought the stock of a trader in a hasty manner and without making any inquiries whether he was indebted, or why he wanted to sell in a hurry.

There were other circumstances of suspicion as to the *bona fides* of the sale, particularly that the purchaser did not call the vendor as a witness; due change of possession took place, but no public manifesta-

tion of it was made. The vendor was at the time of the sale liable to process for debt, and a few days after the sale execution issued.

Held, *first*, that, if *bona fide* for valuable consideration, a sale of goods is not invalidated by knowledge that an execution is intended (following *Wood v. Dixie*, 9 Q. B. 892).

*Secondly*. That, there being proof of payment and change of possession, the circumstances of suspicion did not amount to proof of fraud, and the purchase was good against the execution creditor.

The suit was an interpleader suit by the sheriff: Held, that the sheriff was entitled to his costs of suit against the parties setting him in motion, but not in this suit to his costs of possession.

Mr. *Hawkins* was a tradesman carrying on the business of a brush and toy dealer in the *Inverness Road, Bayswater*. In consequence of a litigation in chancery between him and the omnibus company, he became liable to pay to them certain costs amounting to a hundred pounds or thereabouts, and not paying them, a *fiery facias* under the process of the Court of Chancery issued.

In this state of things Mr. *Hawkins* applied on the 12th of November, through Mr. *Marks*, a friend, to Mr. *Sayer*, a pawnbroker, carrying on business in a distant part of the town, to purchase his stock-in-trade and certain furniture in his house. On a subsequent day Mr. *Sayer* went to view the goods, and afterwards took an eminent auctioneer with him to value them. The auctioneer valued them at a little over 500*l.* intrinsic value, but at 300*l.* auction value, that is, if sold off by

auction. *Sayer* thereupon offered to buy them at 300*l.*, and it was arranged that on *Hawkins* going out, *Sayer* should take from *Marks*, who was the landlord of the house, a lease of it. It appeared that *Sayer* intended to carry on the business, though whether permanently, or only till he could realise the goods, did not appear; for on completing the sale, he retained at a salary *Louisa Compton*, a niece of *Hawkins*, who had been *Hawkins'* shop assistant, to act and serve in the shop for him *Sayer*. The sale was completed on the 17th when *Sayer* paid the money and took a receipt, but there was no bill of sale. On that and the following night *Hawkins* and his wife were permitted to remain in the house; but immediately afterwards *Sayer* took possession, retaining as above mentioned the services of *Louisa Compton*, and *Hawkins* went out. On the 23rd, the writ of *fieri facias* was executed, and the sheriff took possession; and only relinquished it under an indemnity from *Sayer*. *Sayer* on taking possession painted out the name of *Hawkins* over the shop, but did not immediately, or in fact till the sheriff had given up possession, put his own name up. On purchasing he made no inquiries of *Hawkins* whether he was indebted or not, or why he wanted to sell in so great a hurry. But he did inquire of the secretary of a trade protection society for advice, and was advised not to retain the services of *Louisa Compton* or of any of *Hawkins* family. The further details of material facts are stated in the judgment.

The sheriff then filed his bill of interpleader, and the question between *Sayer* and the execution creditors was whether the sale was made to defeat creditors, and whether it was a *bonâ fide* sale, or whether it was not a mere fraudulent arrangement between *Sayer* and *Hawkins*. On the hearing, which was upon the *virâ*

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no examination of witnesses, *Sayer* called all the persons who had been concerned in the transaction except *Hawkins*; but neither did the execution creditors call him.

Mr. *Glasse* and Mr. *Robinson* of the common law bar were for the purchaser *Sayer*.

There is nothing to show that *Sayer* intended to defeat any creditors; he did not know whether *Hawkins* was indebted or not. He knew nothing about him except that he wanted to sell. He did not inquire, nor was he bound to do so. He paid the money, and took possession; for whatever may be said as to there being no actual formal delivery at the time when he paid the money, yet when he went in and *Hawkins* went out, there can be no doubt that was sufficient change of possession, and a sufficiently overt change.

If the sale had been to defeat this particular expected execution, if *Sayer* had known it was expected, that would not have defeated the sale (*Wood v. Dixie* (a)) in point of law, if the sale was otherwise *bonâ fide*.

Mr. *Roxburgh* with whom was Mr. *Hastings*, and Mr. *W. D. Lewis* with whom was Mr. *Eddis*, for the Company and the Directors, the execution creditors.

There never was any actual delivery, nor any overt giving of possession; that is a badge of fraud. When the sale was completed, *Hawkins* and his family remained in possession, and when *Sayer* afterwards went he retains *Louisa Compton*, *Hawkins'* servant. That was a fictitious putting of a person in possession. No

(a) 7 Q. B. 882.

person could have supposed the possession changed; that is the test. He did not put his own name over the shop; he took no steps to make it apparent that he was the owner. There was no regular registered bill of sale; but we say the receipt was in its operation a bill of sale, and ought to have been registered under the 17th & 18th Vict. c. 36. No inquiries were made by *Sayer*; he wilfully shut his eyes. Is not this a case in which the Court cannot fail to see that the whole transaction was collusive between *Sayer* and *Hawkins*?

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Mr. *Glasse* in reply.

It is ridiculous to call the receipt a bill of sale; it was nothing more than a discharge for money paid. The act applies only to cases where the thing sold does not pass by delivery. Here the goods did so pass; and there was a clear change of ownership. That *Sayer* did not advertize himself as owner by putting his name over the shop was perfectly natural. How could he prudently do so while the sheriff's officer was in the house? The moment he was gone he did it.

Mr. *Greene*, for the sheriff, took no part in the argument, but asked for his costs, both of the suit and of the possession as sheriff.

The VICE-CHANCELLOR:

This is a dispute between *Sayer* on the one side, and the Saloon Omnibus Company and their directors on the other. I shall class the two last together, as their case is the same. They are execution creditors against *Hawkins'* goods. In June last proceedings were taken in this Court by *Hawkins*, the result of which was that

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he was ordered to pay costs. He knew he must pay the costs, otherwise process and execution would issue. He was also indebted to his landlord or to the ground landlord in 60*l.* for rent. In this state of things he made the sale of his goods and stock. On the 23rd of November the writ of execution issued by the company was executed by the sheriff. The question is whether at that time they were the goods of *Hawkins*. If the sale was a *bonâ fide* sale they were the goods of *Sayer*. In other words the question is, was the sale a *bonâ fide* sale or void under the statute of Eliz.? Now on the construction of that statute, it is not a ground for invalidating a *bonâ fide* sale that it is made in order to defeat an intended execution. That is decided by *Wood v. Dixie (a)*. The sale of property for good consideration made *bonâ fide* is therefore sufficient to defeat the execution of a judgment creditor. And I have only to consider whether the sale was *bonâ fide*, and on that point every case stands on its own merits. The matter has been very fully investigated, and it is necessary that I should state the result of the evidence.

It appears that Mr. *Marks* was the owner of a house in *Inverness Road* subject to a ground rent. *Hawkins* was his tenant. Up to the 12th of November *Hawkins* was a stranger to *Sayer*, who was an intimate friend of *Marks*. A few days before the 12th of November, *Hawkins* spoke to *Marks* with reference to getting rid of his furniture and stock, wishing him to tell him of some one likely to buy it. On the 12th of November *Marks* took *Hawkins* to *Sayer* and introduced him. Now at this time *Hawkins* was indebted to *Marks* in the sum of 160*l.*, and he wanted *Marks* to advance him some more money, which *Marks* declined.

(a) 7 Q. B. 892.

This negotiation ended in *Marks* buying *Hawkins'* interest in the house for 317*l.*, out of which he was to pay himself and some other expenses for which *Hawkins* was liable, leaving a small surplus for *Hawkins*; and then *Marks* was to let the house to *Sayer* at a rent of 127*l.* On the 13th of November, before coming to any terms with *Hawkins*, *Sayer* consulted Mr. *Pocock*, the secretary to a trade protection society, as to buying *Hawkins'* goods, and as to employing *Hawkins'* wife and niece in the business, and this application is made the ground of an argument that *Sayer* knew he was treading on dangerous ground. But I think if *Sayer* was intending a fraud, he would not have made inquiries; or if he did, when told (as he was) by *Pocock* that it was dangerous to employ the wife and niece, he would not have employed either of them; but he did so. It was on the 15th that *Marks* agreed to purchase the lease. On the 16th *Sayer* went to value the stock, and not liking to trust in his own judgment, he went to Mr. *Robins* the auctioneer, and asked him to look over it, with a view to fortifying his own judgment. Mr. *Robins* went and looked over the furniture and goods and valued them at 508*l.*; but he said that if sold by auction, a third must be struck off, and that under all the circumstances if *Sayer* gave 300*l.* it was as much as he ought to give. Next day *Sayer* and *Hawkins* met; the sale of the household goods and stock for 300*l.* took place; and the house was let to *Sayer*. At the same time a receipt was given by *Hawkins*. Now on that receipt two arguments are founded. First, it is said that the receipt on the face of it shows that it was a sale of everything on the premises. I cannot view it in that light. When the receipt speaks of "goods," it only meant household furniture and stock in trade, the particular things purchased. Secondly, it is said that the receipt

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is in fact a bill of sale that ought to be registered. I do not think it has any such effect.—[His Honor then observed on the language of the act, and continued:—] It appears to me impossible to say this is within any of the words of the statute. It is not even an authority or licence to take possession: it is simply a receipt for purchase-money.

Well, when all this transaction was completed on the 17th, it was nine in the evening, and *Sayer* was going away; and *Hawkins*, who ought to have left the house, got leave to remain with his wife, and so remained, occupying the house for two nights. Now up to this there was certainly no satisfactory taking possession. For *Sayer* went away and left the premises exactly as he found them. But on the 19th *Sayer* came to the premises, and then he took steps to take possession, and to manifest his taking possession; at the same time he engaged *Louisa Compton*, the niece of *Hawkins*, at a salary of 20*l.* a year, as his servant in the business. Now his so engaging her after *Pocock's* caution seems to me rather to rebut than to favor any suspicion of fraud. That *Sayer* should desire to engage *Louisa Compton* was perfectly natural; he was embarking in business matters which he was unable personally to attend to, and he required somebody to do so for him; and it was natural that he should wish to employ *Louisa Compton* who knew the trade and the customers. It appears to me then that this desire was natural, and not inconsistent with the change of possession from *Hawkins* to himself. On the same day he gave directions to paint out the name of *Hawkins*, and it was painted out; but he did not immediately put up his own; and on that it is argued that it is indicative of his not desiring to have the change of possession known. But I think if he had

been acting fraudulently, if it had been a trick between him and *Hawkins*, he would have taken the very course that he did not take ; he would as soon as possible have painted out *Hawkins'* name and put up his own ; and I think there is good reason in the explanation that he gives, that he did not like to put up his own name while the house was in the possession of the sheriff's officer. It was on the 23rd that the levy was made. Now the question upon all these circumstances is, was this a *bonâ fide* sale and purchase, and was there a *bonâ fide* intention to transfer the possession ?

I repeat what I stated in the course of the argument, that at first sight the whole transaction appeared to me one of great suspicion. Much of that has been removed, but it is not entirely removed. One circumstance in particular still presses on my mind, the absence of *Hawkins* as a witness. The omission to call him does leave on my mind a considerable weight of suspicion. I do not forget that it was as competent to the execution creditors to have called him, but in my opinion the principal obligation was on *Sayer* to have called him.

Still, as I have had occasion often to observe, suspicion, though a ground for rigid inquiry, is not a ground, if it remains only suspicion, for an adverse decree. And that appears to me to be the case here ; the suspicion is not wholly removed, though a good deal of it is, but what remains is only suspicion.

The result I have arrived at upon the evidence is, that there was an actual sale ; an actual payment of the money, and that no part of it was returned ; that there was at the latest on the 20th an actual delivery of possession and change of ownership ; and that the re-

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tention of *Louisa Compton* did not prevent it being so. There is clear evidence of payment, and none to raise a suspicion that it is not at this moment in the pocket of *Hawkins*; and the consideration has been shown under the circumstances of the case to be sufficient. The price is below what it seems might have been obtained by a careful sale, or by the use of the goods; but it must be recollected that *Sayer* was buying with reference to what he could sell for, and he had a right to look to make a handsome profit.

I am of opinion therefore that Mr. *Sayer* is entitled to retain the property.

Now on the question of costs. With regard to the sheriff, he had a right to file the bill, and he is entitled to his costs of suit. In an ordinary case he would be entitled to deduct his costs from the sum paid into Court; that of course cannot be done here. But even if it were money, I should have still to determine who shall in the result pay those costs. Now here the sheriff is put in motion by the company and the directors, and as my decision is against them, they must pay these costs.

There remains to deal with costs as between the company and directors and *Sayer*. I have stated that the case is not yet wholly free from suspicion; *Sayer* carried the thing through hastily, and in such a manner as to excite suspicion; he has not brought forward the principal party to whom the whole circumstances of the transaction must be known; and though the creditors have taken an erroneous view, I think they had fair ground for suspicion. Under these circumstances as

between *Sayer* and the execution creditors I shall give no costs.

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The company and the directors will therefore pay the sheriff his costs of this suit; but his costs of the possession I have no jurisdiction in this suit to give.

March 17 & 25.

*Appointment.  
Tenant for Life  
and Remainder-  
man.*

*Receiver's  
Poundage.*

SHORE v. SHORE.

**THIS** cause (see *ante*, p. 219) came on again for further consideration, for the purpose, among others, of arguing the question of the right of the tenant for life of the real estate to be recouped in some form the money that he had paid from 1843 to 1856, out of the rents, for interest upon the testator's debts.

The facts material for understanding the arguments and the judgment were as follows :—

The testator died in November, 1836, having made a will dated the 6th of August, 1836. The effect of that will shortly was this :—The testator directed his debts

*A. was sole le-  
gatee and exe-  
cutor of the tes-  
tator's personal  
estate, and ten-  
ant for life of  
his real estate,  
with remainder  
to his son.*

*At the death  
of the testator,  
he was largely  
indebted, and  
his personal  
estate was out-  
standing, owing,  
as to the greater  
part, to his  
having advanced*

large sums to a bank, of which his son was a partner, and which failed and became bankrupt.

For a long period, about eleven years, the tenant for life kept down the interest of the debts out of his life estate, which was wholly or nearly absorbed by such payment. Ultimately, enough personalty was got in to pay a large portion of the debts, and was so applied; and then the real estate was sold. Held, that no portion of the money representing the corpus of the real estate could be applied in recouping the tenant for life the interest he had paid.

A receiver had been appointed both of the real and personal estate. Held, that the tenant for life must bear the receiver's poundage.

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to be paid out of his personal estate, and out of his real estate in aid of his personalty; and subject thereto he gave his personal estate to his son *Offley Shore*, and his real estate in trust for his son *Offley Shore* for life, with remainder to the children of his son. The testator died seised of considerable real and personal estate and indebted to a large amount, and nearly the whole of the debts arose from his having borrowed monies, partly on mortgage, for the purpose of enabling him to advance those monies to a firm of bankers, of which his son *Offley Shore* was a partner; and the personal estate chiefly consisted of the sums those bankers owed.

*Offley Shore* proved the will in the April following, and matters remained in that state till January, 1843; that is, *Offley Shore* did not pay the debts or get in the chief portion of the personal estate, namely, the debts due from the bankers. The debts remained unpaid, carrying interest, but he kept down the interest on the debts out of the rents of real estate; but in January, 1843, the bankers became bankrupt, and in consequence of that bankruptcy this question now before the Court arose.

The bankruptcy having taken place in January, 1843, in April following this bill was filed by the eldest son of *Offley Shore*, who was then an infant, against *Offley Shore*, for the purpose of administering the estate of his grandfather, and to ascertain and declare the rights of the Plaintiff. In consequence of the bankruptcy of *Offley Shore* a receiver was appointed immediately after the filing of the bill. The order for a receiver was made, in the first instance, of the real estate only, but afterwards of both the real and personal estate. The bankruptcy stopped all interest on the debt due from the bankers; but of course if the assets of the bank were

sufficient to pay all the debts in full there would be a right to interest on them. An order was then made that the receiver should petition the Court of Bankruptcy for leave to prove the debt under the bankruptcy, and the receiver went in and proved the debt, and on the 17th of February, 1847, the first dividend amounting to nearly 40,000*l.* was received from the bankrupt's estate on the debt, which amounted to about 75,000*l.*

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In 1859 the question was raised in what way the Court would interfere in the administration of the personal estate, in order to work out the equities between the tenant for life and remainderman of the real estate.

It appeared that of the 40,000*l.* personalty received, a large sum, about 28,000*l.*, had been applied in discharge of principal of debts and costs. And it appeared also that the real estate had been sold for about 65,000*l.* Until this application of the personal estate to pay debts, the whole income of the real estate had been absorbed in keeping down the interest, so that if the whole of the produce of the real estate was treated as belonging to the reversioner, the tenant for life would have been for a considerable number of years, from about 1843 to 1856, receiving no life estate at all. And the question was whether some portion of the produce of the real estate ought not to be treated as applicable in some form to recoup the tenant for life for the interest so paid out of his life estate.

*Mr. Glasse* and *Mr. Osborne* for the assignees of the tenant for life.

You have it now ascertained that the real estate has been sold and has produced 65,000*l.* or thereabouts.

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The tenant for life between the years 1842 and 1856 received nothing from the real estate. All the personal estate, to which he was absolutely entitled, was not more than sufficient to pay the debts. The remainderman, who receives the benefit of that payment of debts by its exonerating the real estate, cannot be entitled to take the whole of the corpus, leaving the tenant for life to lose all the income that he has paid. If the personal estate had been got in and applied in due course it would have been applicable in this way: first to pay interest, and then to pay corpus of debts. That would have reduced the amount of debt, and consequently, of interest, and the tenant for life would have had some income. By the course which has been taken, interest has run on; it has been paid out of the rents, and ultimately personal estate enough to pay the corpus of the debts has been got in. But we say that ought to be in some way apportioned as between the tenant for life and the remainderman; and to do so, one of two courses may be taken. Either you ought to fix some period, we say 1842, for fixing the value of the personal estate, and from that time interest upon it at 3*l.* or 4*l.* per cent. should be allowed to the tenant for life out of the real estate, which would not have had to be resorted to if the personal estate had been got in; or else you ought to take the personal estate as if it had been applied in payment of interest first and then of principal, and charge the corpus of the real estate now realized with so much as the tenant for life has paid beyond what he would have had to pay if the personal estate had been so applied. [They referred to *Sitwell v. Barnard* (a), and the case before Lord St. Leonards, *Coote v. Lord Milltown* (b).]

(a) 6 Ves. 520.

(b) 1 Jones & Lat. 501.

Mr. *Baily* and Mr. *W. H. G. Bagshawe* for the tenant in remainder.

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There is a fallacy in treating the personal estate as belonging to the tenant for life; it was not his till the debts were paid; the surplus only was his. The personal estate had therefore simply to be got in and applied in due course of administration. While it was not got in the case stood simply as if there had been none, and tenant for life and tenant in remainder of real estate charged with payment of debts; then of course the rule applied that income would be liable to pay interest, and corpus to pay principal.

That the personal estate was got in only by dribblets, and after a long lapse of time, was the result of the bankruptcy of the tenant for life himself, who was the debtor. When it was got in it was applicable and was applied in payment of what remained of debt. The case is really nothing more than that of tenant for life and tenant in remainder of real estate charged with debt, when the testator's estate is producing no personal estate for payment of the debts.

Mr. *Glasse* in reply.

The VICE-CHANCELLOR after stating the facts proceeded thus :— 26th March.

One argument which has been raised would appear at first sight to be irresistible, viz. that in point of fact the tenant for life, who is asking to have the administration of an equity in his favor, is himself the debtor, and that it is his failing to pay the debt that has caused the loss of interest which should have been



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applied to pay the interest, and so release the life interest in the realty; and if the matter merely stood thus, it would be impossible for me to hold that he would have any right to say,—“Though it is my fault that you have not got the personal estate to pay the debts, yet I will derive the benefit of that default.” Not only is he himself the tenant for life, but he is also sole executor. Now supposing the executor had been a stranger:—It was the fault of the executor that the personal estate was not got in. *Offley Shore* was that executor, and also sustained the character of tenant for life of the realty, and as executor was bound to get in the personal estate. But I am precluded by what took place when the case came on for further directions from deciding on that ground. An arrangement was then made of this kind,—*Offley Shore* insisted that he had laid out large sums of money in lasting improvements, which the tenant for life should not bear; and a claim was made on that head for a sum of 14,000*l.* as against the corpus of the estate. On the other hand there was a claim against *Offley Shore* as defaulter, and claiming that his life estate in the realty must be applied in discharge of the debts; and an arrangement was made that the one claim should be set off against the other. I cannot therefore admit that argument.

When personal estate is (not as here, for here it was *Offley Shore's* absolutely) given to one for life, with remainder over, the equity is that the income of the personal estate pays the interest on the debts, and the corpus pays the principal; and if the realty be given in aid of the personalty for payment of debts, and then given to one for life with remainder over, the life estate pays interest and the remainder the capital. Then we come to the question which is in fact the case now be-

fore me. Suppose the personalty is given absolutely, and the realty given to one for life, with remainders over; does this Court interfere if the personalty is insufficient to pay the debts in order to work out the equities between the tenant for life and remainderman? I must try it upon this principle, which I maintained on the former hearing,—that, as a general rule, in every ordinary case where the Court is called upon to examine the question, the Court will, although the personal estate be given to one absolutely, administer it, in order to work out the general principle of making the income of the personalty pay the interest of the debts, and the corpus of the personalty the principal; because by administering that equity you ascertain how much of the deficiency of the personalty falls on the tenant for life and how much on the remainderman.

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Now we come to the question, the real question in this case. In 1849, nine years after the death of the testator, a dividend was paid. That is to say, some part of the personal estate which for a time has not been yielding income has been got in; and the contention of the tenant for life is that it should not be applied exclusively in payment of the debts, because it is under peculiar circumstances. If it had been producing income, that income would have gone to pay the interest; and it is said that if it goes in payment of the principal of the debts, the tenant for life will get no benefit. On the other hand, the remainderman says it is corpus, and as such should be applied in payment of the principal of the debts. And the question is now this, whether the tenant for life is entitled to any, and if any what, administration of equity on this subject?

It has first been contended that there being debts

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carrying interest, and the bankrupts having now paid a certain sum on account of debts owing to the estate, that money should be applied first in repaying to the tenant for life all that he has paid for interest on the debts, and after payment of all the interest, in paying the capital. No doubt as between debtor and creditor, if *A.* owes *B.* a debt consisting partly of interest and partly of principal, and *B.* receives part payment, he has a right to say he will consider this to be in payment of interest and not of capital. But here the question is between tenant for life and remainderman; and it is obvious that this contention of the tenant for life is in direct violation of the principle, that the Court will in administering the personalty apply the income in payment of interest and the corpus in payment of capital; and therefore it is impossible to maintain it.

The question then that remains is whether the 28,000*l.* is to be treated as applicable altogether in discharge of the debts, or am I in any way to apportion it between the parties? Is there any equity for apportionment? And if so, how is it to be apportioned? Is it to be a *pro rata* apportionment? No doubt had it been a case in which the general principles of equity required some such administration, the Court would find its way to do it. In the ordinary case, where personal estate is given to one for life with remainder over, by reason of difficulty in getting in the personalty, or from some other cause, it often becomes necessary to apply some apportioning principle of equity for the purpose of determining how to work out the intention of the testator as to the income the tenant for life should enjoy. In many cases if you give to the tenant for life the whole income which has accrued, you give him more than he ought to have; for the property may be bearing what may be

called an abnormal interest. On the other hand some property may not be bearing interest at all. In such cases the Court will, in order to work out the intention of the testator, apply some principle to ascertain what is to be regarded as the life income as between the tenant for life and remainderman. It is often very difficult to apply that principle, and the point has given rise to many differences of opinion. That is the case which Lord *St. Leonards* refers to in his judgment, and in order to try whether we should apply that principle to the present case, we must look at the circumstances.

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The testator died in 1836, and the bankruptcy occurred in 1842, and during that period everything was done that ought to have been done, except getting in the corpus of the personal estate, and paying off the debts. *Offley Shore* kept down the interest on the debts due from the estate. When the bankruptcy took place, in consequence of that event, the part of the personal estate, which from the testator's death to the date of the bankruptcy had been bearing interest, ceased to do so.

From the time when the testator died down to the date of the bankruptcy, a period of six years, the debts were carrying interest, and the personal estate was also carrying interest; the latter in effect kept down the former; and during all that time the rights of the tenant for life and remainderman were duly adjusted; and it was unnecessary to resort to any such principle as I have referred to. Then came a period during which the personal estate produced no income. Now suppose a case where the personal estate had been given to one for life, with remainder over, and after six or seven years the personal estate had ceased for a time to produce income; would the tenant for life be entitled to

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say "Although there was no necessity to resort to the equity at the testator's death, now there is personal estate got in, which is entirely corpus, give me some of that corpus as part of my income?" I am of opinion that such a claim could not be maintained. And it appears to me that I cannot apply any such principle as that contended for here in the present case. It is in this case a hardship which must be endured. Suppose part of the personal estate consisted of money in the hands of bankers, yielding interest, and then the corpus was entirely lost: would the remainderman be entitled to say to the tenant for life "You have been receiving the income and must let me have some?" He could not raise any such contention. Upon this point I must decide against the assignees of the bankrupt.

There remains but one other question, which is, whether the receiver's poundage should come out of the rents and profits, *i. e.* out of the life interest, or be in some way apportioned. It is contended on the part of the tenant for life that it is for the benefit of the remainderman, as well as for the tenant for life, that the receiver was appointed. And the same question has been raised with regard to the expenses of passing the receiver's accounts. It is said it was for the benefit of both parties, and that the costs should be apportioned between the parties. I cannot say that there is not a certain plausibility in the contention; but such a claim was never before made; and it may be answered in this way: that if it becomes necessary to have a receiver, the estate for life is inherently subject to it, and it is the right of the remainderman to have a receiver appointed and to have the ordinary expenses of such appointment paid out of the life estate.

1859:
4th May.

Practice.
Jury.

BRADLEY v. BEVINGTON.

IN this case answers were put in; evidence by affidavits had been gone into and was closed; and the cause was set down to be heard.

The bill was for the accounts of a partnership, and questions arose as to the existence and terms of an alleged agreement, and the evidence was conflicting. A motion was now made by the Plaintiff, that—"The following questions of fact arising in the cause might be tried by a common jury before the Court."

The 21 & 22 Vict. c. 27, intends a jury to be called only where before an issue would have been directed, and therefore, where a cause was ready to be heard, the Court refused to call a jury to try certain issues of fact. *George v. Whitmore* (a) approved.

1st. Whether there was any agreement between the Plaintiff and the Defendant to divide the net profits of the straw department of the Defendant's business carried on at 67, *Cannon Street West, St. Pauls*, from the 25th December, 1857, until the winding-up of the said department?

2nd. In case the aforesaid question should be answered in the affirmative, then, whether the said agreement provided for the calculation and ascertainment of the said net profits; and if so in what manner were said net profits to be calculated and ascertained?

3rd. In case the first question should be answered in the affirmative, then, whether the said agreement was to divide in the proportion of one-half of the said net profits to the Plaintiff, and one-half to the Defendant's firm.

(a) 7 W. R. 225.

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The motion prayed that a day might be fixed for the trial of the said questions of fact, and an order made for the sheriff to summon a common jury for such trial, or that such other order as to the Court should seem fit might be made.

The motion was supported by an affidavit of the Plaintiff's solicitor, that he believed the questions were questions which ought to be considered by a jury; and by the answers and the affidavits in the cause.

Mr. *T. Napier Higgins* for the motion.

The application is under 21 & 22 Vict. c. 27 (Sir *Hugh Cairn's Act*).

By the 3rd section, it is lawful for the Court of Chancery, if it shall think fit, to "cause any question of fact arising in any suit or proceedings to be tried by a special or common jury before the Court itself;" and by the 4th, the question of fact is to be reduced into writing in such form as the Court shall direct, and at the trial the jury is to try that question.

1st. As to the jurisdiction. The jurisdiction is not so narrow as the Court held it in *George v. Whitmore* (a). That decision if upheld would, in the majority of cases, completely neutralize the act. Neither the legislature nor the General Orders of the 4th of April, 1859, have said one word about assimilating the exercise of the jurisdiction to that of directing an issue under the old practice. The act empowers the Court to try by jury *any* question of fact in any *suit* or *proceeding*. That clearly points at trying it in the first instance; not at

(a) 7 W. R. 225.

trying it upon the written evidence first, and then trying it over again by a jury. It will be said that the Court is to settle the issue in writing, and that it cannot do that till it has tried the cause. No doubt it cannot do so without looking into the evidence for the purpose of seeing what is the disputed question of fact. But it does not require further than for that purpose to try the cause. Here we have the evidence before the Court, showing how the question of fact arises, and there is enough for the Court to settle the issue. If the Court hears the cause first, and then directs a jury, the evidence has to be twice taken and the cause twice heard. The very object of the act was to bring the cause before the Court with complete evidence.

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The act cannot mean in all cases to postpone a jury till after the hearing of the cause; for it uses the term *any proceeding*, which includes preliminary proceedings. Clearly therefore, on a preliminary motion, a question of fact may be tried by a jury, and that would be necessarily before the Court heard all the evidence. What the act intended was that at any stage of a cause where the Court can be satisfied by the evidence then before it that there is a question of fact fit to be tried by a jury, the Court may order a jury.

2nd. As to the discretion of the Court; the act means of course a judicial discretion. When the Court sees that the question is one that cannot be satisfactorily determined by our imperfect mode of taking evidence, it may order an oral examination with or without a jury.

Now we have direct contradiction of evidence, and facts of such a character as would have been under the

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old practice sent to an issue. This is therefore a proper case for the Court to exercise its discretion.

Mr. *Baily* and Mr. *Martindale* *contrà*, relied on *George v. Whitmore*, but were not called upon to argue.

The VICE-CHANCELLOR :

The words of the act no doubt have some appearance of favoring the Plaintiff's contention. But the present motion is governed by the decision of the Master of the Rolls in *George v. Whitmore*, with which I entirely agree. I think the act meant that questions might be referred to a jury only where, under the old practice, you could have had an issue, either at the hearing or upon an interlocutory application. Otherwise, the Court might be called upon on motions like the present to go into the whole of the evidence, merely for the purpose of deciding whether it ought to have a jury summoned to try certain questions of fact. How is the Court to know whether these questions are proper to be decided by a jury, or whether they properly arise in the case until it has heard the evidence? Then it can refer any question which it thinks fit to a jury. Agreeing as I do with the decision of the Master of the Rolls in *George v. Whitmore*, this motion must be dismissed with costs.

1859.
5th May.

Powers.

MAPLETON v. MAPLETON.

THIS was a suit instituted for the purpose of obtaining the determination of the Court on the validity of the exercise of certain powers.

By a deed (being a settlement on the marriage of *David Mapleton* and *Sarah Louisa Banbury*) made in 1807, certain sums of stock were settled in trust for the husband for life; remainder to the wife for life; remainder upon trust, immediately *after the decease of the wife*, to pay over, apply, distribute and divide the said trust money and every part thereof unto and amongst all and every the child or children of the said intended marriage, and the issue of such child or children *who should be then living*, in such parts, shares and proportions, if more than one, and with, under and subject to such limitations and conditions, and in such manner and form, and with or without power of revocation, as the said *David Mapleton* should from time to time during his natural life, by any deed or deeds, writing or writings, or by his last will and testament in writing to be duly executed and attested, direct, limit or appoint. There was then, in default of such appointment, a similar power to the wife to appoint to children and issue of children living at the husband's death, and in default of any appointment a limitation over unto and amongst

(a) 2 Eden, 34.

fifth child died, leaving three children, one of whom, *A.*, was living at the death of the first donee, the other two being born afterwards. The second donee, the wife, then appointed among her four children and to *A.*, the eldest child of her deceased child.

Held, that although the two others would have been objects of the primary powers, their exclusion by the joint operation of the two powers did not render the execution of either bad.

1. Where there is a primary power, and in default of appointment a secondary power, a partial exercise of the primary power does not exclude the exercise of the secondary power. *Simpson v. Paul (a)*, disapproved.

2. Power to husband to appoint among children and issue of children living at *wife's death*; in default of appointment, power to wife to appoint to children and issue of children living at *husband's death*.

The husband appointed to four children only, leaving a fifth living at his death, with issue. After his death the

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all the children of the said intended marriage and the issue of such child or children, share and share alike, equally to be divided between them, such issue taking only so much as their respective father or mother if alive at the death of the said *D. Mapleton* would have taken.

There was issue of the marriage five children:—*David Robert Banbury Mapleton, Tamesia Louisa Sarah Mapleton, Henry Mapleton, Christiana Frances Mapleton* and *Martha Ann Blanch Mapleton*. They all survived their father.

David Mapleton the father appointed by two deeds and his will four-fifths of the fund, viz. one-fifth to his daughter *T. L. S. Mapleton* one-fifth to *M. A. B. Mapleton*, one-fifth to *Christiana Frances* and one-fifth to *Henry*.

He died leaving his wife him surviving, and she by her will appointed the remaining one-fifth, except 20s., to *Maberly Ann Mapleton*, the eldest child of her deceased son *David Robert Banbury Mapleton*, neither he nor his children having been included in the appointments made by her husband, and she appointed the 20s. in fourths, one-fourth to her daughter *T. S. L. Bradford* and her issue living at the decease of her husband, and three other fourths to others of her children and their issue living at the death of her husband. But she appointed nothing to the Plaintiffs, who were the other children of *David Robert Banbury Mapleton*. *David Robert Banbury Mapleton* survived his father, and *Maberly Ann Mapleton* was living at the death of *David*; but the Plaintiff was born after *David's* death.

The Plaintiffs claimed to be objects of the first and

second powers, or of one of them; and contended that by reason of their total exclusion, both of the powers were badly exercised, or at least that the second was.

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Mr. *Anderson* and Mr. *Briggs* for the Plaintiffs.

1st. We are objects of the first power given to the husband; the objects of that power are the children of the marriage and the issue of such children living at the death of the wife.

We are issue of a child and were living at the death of Mrs. *Mapleton*, and therefore are within the first power, if you read children and issue as a class. But if you read it, children living at the death of the particular person, or, by way of substitution, issue of such a child dying before any appointment, then we are objects of the second power; which is to give to children and issue of children who should be living at the death of *David*. Now our father was living at the death of *David*, and died before the wife made any appointment, leaving us to be appointees by way of substitution.

Now if we are objects of the second power, clearly that was badly exercised, and we take an interest in that fifth under the limitation in default of appointment.

But supposing we are not objects of the second, but are of the first, and we must be by the very reasoning of one or the other, then we say that power was badly exercised by excluding us.

If *David* had left anything to descend to us, we admit we could not contend that the powers would have been badly exercised. But, if he left nothing to descend, then assuming, as we are now assuming, that the second power *could* not embrace us, the husband's power was badly executed, because it excluded us.

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Now we say the unappointed fifth did not *descend*; it passed immediately under the second power, which embraced different objects, and did not include us, so that four-fifths of the fund of which we were objects was appointed wholly away from us, and the other one-fifth passed not by the ultimate limitation over, but to and under a power which could not be exercised in our favor. It was therefore bad. They referred to *Simpson v. Paul* (a); *Sugd. Powers* (b); *Lee v. Head* (c); *Bristowe v. Warde* (d); *Wilson v. Piggott* (e); *Routledge v. Dorril* (f); *Sugd. Powers* (g); *Foster v. Cautley* (h).

Mr. *Lee* and Mr. *Lewis* for the appointees of the wife; Mr. *Glasse* and Mr. *T. Napier Higgins* for the appointees of the husband; and Mr. *Baily* and Mr. *Tripp* for other parties, were not called upon.

THE VICE-CHANCELLOR:

I have no doubt in this case that it is impossible for the Plaintiffs to take any share of the fund. Under the primary power, after the death of the husband and wife, the fund is to go amongst all and every the child and children of the intended marriage, and the issue of such child or children who should be living at the death of the wife. Now I will assume for the Plaintiffs, but without expressing any opinion, that those words do not import an exclusive power, but that if there were an appointment of the whole fund, it must be in favor of all. I assume also that the word *then* refers to the death of Mrs. *Mapleton*. I will assume also for the Plaintiffs that it is in favor of all the children living at the death

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| (a) 2 Eden, 34. | (d) 2 Ves. jun. 336. |
| (b) Vol. 2, pp. 218, 235 | (e) Ib. 351. |
| (6th edit.); vol. 1, p. 358 (6th | (f) Ib. 357. |
| edit.) | (g) Vol. 2, p. 224 (6th ed.) |
| (c) 1 Kay & John. 620. | (h) 6 De G., M. & G. 55. |

of Mrs. *Mapleton*, and the issue then living of children antecedently dead. Then as to the secondary power, who are the objects of that power? They are the children of the marriage and issue of children living at the death of the husband. Now do these latter words refer to children only, or issue only, or to children *and* issue of children? In my opinion they refer to both—the word “such” is in connection with the words child and children, so that to entitle any person to take as an object, he must be a child of the marriage or issue of a child, and living at the death of *David Mapleton*. I assume also that this power does not warrant an exclusive appointment. Then after the two powers, there is a trust over.

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Now it is contended, firstly, that whatever is the effect of the power given to the husband, the power given to the wife cannot be exercised if the husband has in any degree exercised his, and certainly in *Simpson v. Paul*, Lord *Northington* does seem to hold that, as a general proposition, the exercise of a primary power to a partial extent does preclude any exercise of the secondary power. But Lord *St. Leonards* has expressed his opinion very strongly that the view of Lord *Northington* is wrong. And I think I am justified in adopting the view of Lord *St. Leonards*, that the partial execution of a primary power does not exclude the exercise of a secondary power. And in this particular case, I think the words themselves are sufficient to enable an exercise of the secondary power upon any portion of the fund not appointed under the original power.

I think therefore the wife was capable of exercising her power, notwithstanding the partial exercise by her husband.

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As to the objects of the wife's power, I have already observed that they are in my opinion all the children and the issue of such children living at the death of *David Mapleton*, that is, children of the marriage living at his death and issue living at his death. The Plaintiffs, who are not issue living at his death, are not objects of that power.

Then are they within the scope of the first power? The objects of that power are children or child living at the death of *Mrs. Mapleton* or issue of such children living at her death; and the Plaintiffs are therefore within that power.

Then the question is this, the father partially executed his power on three occasions, but he made no appointment in favor of *David Robert Banbury*, the eldest; and he left one-fifth unappointed. So far it is not contended that that appointment was bad, and I am clearly of opinion that during the father's life at least it was good.

Then *Mrs. Mapleton* finds this state of things,—her husband had appointed to four children; one-fifth remained; and there is not a fifth child living, but three children of that deceased child. Then she is advised no doubt that she has not an exclusive power, that the objects of her power are all the children of the marriage living at the death of *David*, and the issue of any such child, and she appoints all the rest of the fund in the manner stated, and I am of opinion that she has not exceeded her power.

But then it is argued, that although the wife has not exceeded her power, the effect of her exercising it is, that between the exercise of the husband's power which is not wrong, and the wife's which is not wrong, certain

parties are excluded, and thence it is concluded that the husband's exercise of his power, or at least the last exercise of his power, is wrong. I cannot say that I accede to that argument, and I cannot come to the conclusion that either of these instruments of appointment is bad.

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But there remains another point fatal to the Plaintiffs. If all these instruments were void; if the whole fund, or any part of it, were badly appointed, the present Plaintiffs do not come within the ultimate trust.—[His Honor referred to the trust in default of appointment.] Now these words show an intention of substituting the issue. In what event then are the issue to be substituted? At what period must the child be dead in order to substitute for him his issue?

I am here assuming, but without pronouncing any express decision, that the issue are to be substituted for parents in certain events. And I will assume that if no period had been expressly stated, it would be the period of distribution. The parties have however pointed out the period, viz., the death of *David Mapleton*. The event is, children living at the death of *David Mapleton*, and no issue of any child is to take unless the parent predeceased *David Mapleton*. But here *David*, the father of the Plaintiffs, was alive at the death of his father *David Mapleton*. They are therefore not entitled to take in default of appointment, even if the powers were improperly exercised.

The bill was therefore dismissed, but, at the request of the parties, with a prefatory declaration that the several instruments referred to were good and valid executions of the powers.

1859:
January 17.

*Mortgagee.
Production of
Documents.*

HOWARD v. ROBINSON.

A bill was filed by a legatee of a legacy charged on a term of years against the trustee and against the mortgagee of the term under a mortgage made by the surviving trustee, who had power to give receipts.

The bill made a case against the mortgagee of knowledge of circumstances which affected him with a breach of trust; but did not allege that the deed disclosed those circumstances. The mortgagee's answer admitted the deed, and craved leave to refer to it when produced; but denied the notice.

Held, that the Plaintiff could not have production of the mortgage deed.

THIS was a summons adjourned from chambers.

The question was whether the Defendants, who were mortgagees, were bound by the terms of their answer and the nature of the suit to produce their mortgage deed for inspection under the order to inspect documents.

The following are the facts of the case :—

Richard Chaffer (the testator in the cause) bequeathed (*inter alia*) a legacy of 1,500*l.* to the Plaintiff, and to secure the payment of the same vested all his real estate in his trustees for a term of 800 years upon trust by sale or mortgage or other disposition to raise sufficient money for the payment and satisfaction of the legacies given by his will, with a declaration that the receipt of his trustees or their survivor should be a sufficient discharge.

By an indenture dated the 1st of July, 1853, the surviving trustee assigned the term of 800 years in the testator's property by way of mortgage to the Defendants *John Robinson* and *William Birtwhistle* to secure a sum of 1,000*l.*

The legacy of 1,500*l.* not having been paid, a bill was filed by the legatee for the purpose of having it raised and paid, and the two mortgagees were made Defendants to that bill.

The legatee by his bill alleged that the surviving trustee had applied the mortgage money he had received to purposes not in accordance with the trust. That the Defendants, the mortgagees, knew that the Plaintiff was a minor and that his legacy had not been paid, and also that the legacy was charged on the property mortgaged to them.

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The mortgagees by their answer admitted that the indenture of the 1st of July, 1853, was to the effect set out in the Plaintiff's bill, but for greater certainty as to the contents thereof they "craved leave to refer to the same when produced to this honorable Court." They further stated "that by the said indenture it is also witnessed that the said 1,000*l.* was paid and lent by us immediately before the execution of the said indenture, the receipt of which sum of 1,000*l.* to be by the said *B. Chaffer* (the surviving trustee) applied upon the trusts of the said term of 800 years is thereby acknowledged by the said *B. Chaffer*." They denied that they had notice of the fact that the legacy was charged on the lands devised by the testator or that they were aware until after the mortgage that the Plaintiff's legacy had not been paid. They also denied that they were aware that the mortgage was made for the private purposes of the trustee and not in accordance with the trust.

On the 19th of November, 1858, the Plaintiff obtained an order in chambers for production by the Defendants *John Robinson* and *William Birtwhistle* of the "several deeds, books, papers and writings mentioned in the schedule to the answer of the said Defendants, and also the mortgage deed dated the 1st day of July, 1853, in

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said answer mentioned and admitted to be in their possession or power."

On the 14th of January, 1859, the Defendants *John Robinson* and *William Birtwhistle* applied by summons at chambers to vary the order for production of the 19th of November, 1858, by omitting the words "and also the mortgage deed dated the 1st day of July, 1853, in the said answer mentioned."

This summons now came on for argument before the Court.

Mr. *J. Sidney Smith* for the Defendants *John Robinson* and *William Birtwhistle*.

The mortgagees are not bound to produce their mortgage deed. They take in priority to the Plaintiff, inasmuch as they derive their title by a mortgage from the surviving trustee of the term of 800 years created by the will of the testator with the concurrence of his executors. They only claim as mortgagees and are willing to be redeemed, and the Plaintiff is only entitled to the production of their mortgage deed upon paying off the principal and interest due to them. The circumstance of their having by their answer referred to their mortgage deed when produced for greater certainty as to the contents thereof, does not vary the general rule applicable to the case of mortgagor and mortgagee, nor entitle the Plaintiff to production. The case of *Hardman v. Ellames* (a) does not apply, because that was not a case between mortgagor and mortgagee. Lord *Cottenham* in the case of *Adams v. Fisher* (b) explained more fully his decision in *Hardman v. Ellames*.

(a) 5 Sim. 640.

(b) 3 My. & Cr. 526.

A mortgagee submitting by his answer to be re-deemed cannot be compelled before the hearing of the cause to produce his mortgage deed: *Wigram on Discovery* (a). The reference to the document when produced was merely to satisfy the Defendant's conscience. The mortgage deed was not set up by the Defendant as a defence, but was set forth by them in compliance with the Plaintiff's interrogatory.

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[The Treatise of Vice-Chancellor Sir J. *Wigram on Discovery*, pp. 324—340, and the authorities there referred to, were also commented on.]


Mr. G. M. Giffard, *contrd.*

A mortgagee is not always protected from producing his mortgage deed. Suppose the question was, what was the amount of the mortgage money? He may be ordered to produce it to show that he admits the possession; he sets it out, and craves leave to refer to it. That upon the authorities entitles us to inspection. Besides here it may be material to the Plaintiff's case, and so support his title. Suppose the deed does on the face of it show the transaction to be as we allege; then it would be in support of our title to relief.

The VICE-CHANCELLOR, without calling on Mr. Smith for a reply.

I am of opinion that the Defendants are not compellable to produce their deed. There is no doubt as to the general proposition. A Plaintiff has a right to have inspection of every deed, paper or writing in the pos-

(a) Page 267 (2nd edn.)

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session of the Defendant which helps to make out the Plaintiff's case; but no right to inspect those which only tend to make out the Defendant's case.

The case of a mortgagee is supposed to stand on its own special circumstances, though in fact it is only one of the cases within the general rule; however, at any rate, ordinarily, if a mortgagor files his bill against the mortgagee, he cannot see the mortgage deed without redeeming.

There may be instances where the mortgagee makes out a special case, as when the deed to some extent can be shown to support the Plaintiff's case. But if a mortgagee files a bill simply to redeem, and states the deed, and the Defendant by his answer admits it, adding that the deed is to the effect stated, when the cause comes to a hearing, and not before, the mortgagor has a right to see the deed upon redeeming. Suppose the Defendant admits the deed, and admitting generally its effect, adds by way of guarding his own conscience, that he craves leave to refer to it when it shall be produced; the question is, does that reference entitle the Plaintiff to see it?

Another case may arise; the Plaintiff states his case; the Defendant in his answer states what the Plaintiff has not referred to, viz., that he, the Defendant, has a deed which not only does not support but destroys the Plaintiff's right. In that state of things, if that were all, the Plaintiff would have no right to the production of a deed which makes out the Defendant's case by destroying the Plaintiff's. Suppose the Defendant, after stating the deed and its effect, says, in the common form, "and so it will appear if the same shall be pro-

duced," I am wholly at a loss to comprehend why those words should give any greater right to the Plaintiff. There is no reason whatever for the proposition. Those are the two cases which may arise on what may be called the technical ground. Now if the putting those words in the answer would give the Plaintiff a right of inspection in either of those two cases, it appears to me that it would be in the case where the deed is mentioned by the Plaintiff, and the Defendant admits it, and refers to it, and not in the case where the Defendant sets up his own deed. But Lord *Cottenham*, referring to *Hardman v. Ellames* in a subsequent case, says that decision is misunderstood if it is supposed to decide that there is the right where the Plaintiff mentions the deed. He says expressly all that it decides is, that when the Defendant sets up his own deed and refers to it, he must produce it. I am bound to say that I cannot follow the reasoning; though if this were that very case, I might be bound by the decision. But this is, on the contrary, the very case that Lord *Cottenham* says he did not mean to decide. This therefore, not being *Hardman v. Ellames*, it does not come within Lord *Cottenham's* decision, and I will not apply the decision of that case to it on the technical ground.

Then I must put the case on the general footing. Now if the Plaintiff is entitled only to the equity of redemption; or if the Defendant's mortgage is prior to his claim, the Plaintiff has no right to production. If the Defendant's title is posterior to the Plaintiff's, then production would be immaterial to him; and I am aware of no rule giving a prior mortgagee a right to see the deed of a puisne mortgagee.

But here the very contest is as to the priority; and

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the question is, does the Plaintiff's right to relief depend at all on the contents of the deed?

The Plaintiff's title arises under a will.—[His Honor then commented on the case made by the bill, observing, that in substance the Plaintiff's case was, that the Defendant knew of circumstances at the time of taking his deed, the knowledge of which made him a party to a breach of trust, and postponed him; he then proceeded as follows:—

Now if the Plaintiff makes out that allegation to be true, he makes out his case; there is no other allegation giving him any title to the relief he asks. Now how will production of the deed assist the Plaintiff's case? The Plaintiff alleges himself what the deed contains; and he does not allege that it contains anything that supports his case. The Defendant in his answer denies the truth of the allegation, which is the foundation of the relief. Can I say in that state of things, that the Plaintiff has a right to production for the purpose of making out his case?

It is the case of a Plaintiff claiming to be prior incumbrancer, but being according to the Defendant second incumbrancer. If at the hearing the Plaintiff makes out no more than is alleged by the Defendant, then he will have no right except to redeem,

On both grounds, therefore, the technical as well as the substantial ground, I think the order to produce erroneous.

Costs ordered to be costs in the cause.

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February 19.

*Contributory.
Misrepresentations in Report
of Directors.*

In re The NATIONAL PATENT STEAM FUEL
COMPANY, *Ex parte* WORTH.

THIS was a summons adjourned from chambers. The question was whether the name of Miss *Worth* should be placed on the list of contributories under the winding-up of the *National Patent Steam Fuel Company*, in respect of certain preference shares in that company which had been transferred to her, the deed of settlement not authorizing the issuing of preference shares.

In July, 1854, the directors issued a circular announcing that about 2,000 shares, on which 1*l.* per share had been paid up, had been forfeited to the company, and that those shares would be re-issued, and would be 6*l.* per cent. preference shares.

In November, 1854, Mr. *Fry*, who was a director and shareholder of the company, took a transfer of 300 of those shares from the company.

At the annual general meeting of the company held on the 25th of January, 1855, the re-issue of the forfeited shares as 6*l.* per cent. preference shares was confirmed by resolution.

On the 10th of July, 1855, Miss *Worth* accepted a transfer of 100 of these six per cent. preference shares from Mr. *Fry*.

Where the directors of a company in the discharge of their duty make a report to a general meeting of the shareholders containing misrepresentations; and a third person, relying on those misrepresentations, deals with the company by taking shares direct from the company, those representations vitiate the whole transaction. But where a third person, relying on such misrepresentations, takes shares not from the company but from a shareholder in the company, the transaction is not vitiated, and the third person is liable as a contributory in respect of the shares he has so taken.

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The 100 shares which were transferred to Miss *Worth* had been originally allotted to Mr. *Henry Walker Wood*, and formed part of 360 shares transferred by Mr. *H. W. Wood* as forfeited shares to Messrs. *Baker* and *Fox* as trustees of the company, and by them transferred to Mr. *Fry*.

The transfer of the shares to Miss *Worth* was recognized and confirmed by a meeting of shareholders, and Miss *Worth* executed the deed of settlement of the company.


Mr. *Glasse* and Mr. *Baggallay* for the official manager.

Miss *Worth* is liable as a contributory in respect of the 100 shares transferred to her by Mr. *Fry*. The fact of those shares having been declared preference 6l. per cent. shares by the directors of the company, although they had no power to issue preference shares, does not alter her liability as a shareholder in the company. She signed the deed of settlement of the company, and by the 68th clause of that deed, it is provided that every person by signing the deed enters into all the liabilities of a shareholder, and thus Miss *Worth* has become a shareholder and liable to be placed on the list as a contributory.

Mr. *Amphlett* and Mr. *Southgate* for Miss *Worth*.

Although Miss *Worth* has signed the deed of the company she did not become liable as a shareholder, because there has been a misrepresentation made by the directors of the company to a general meeting of the shareholders, and thus to the public, on the faith of

which Miss *Worth* contracted to take shares, and signed the deed of settlement; and the contract which she was so induced to enter into by those misrepresentations cannot be enforced against her. That principle was acted on in *Brockwell's Case (a)*, where it was held, that where a company makes representations that are false, persons acting under them would not be bound to the company. The decision in *Hitchcock's Case (b)* and in *Ex parte Barclay (c)* are founded on the same principle.

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Mr. *Glasse* in reply, distinguished the cases cited in behalf of Miss *Worth* from the present case, showing that in those cases the dealing was between the company and the individual sought to be charged as a contributory, whereas in the present case, whatever the misrepresentations might have been, they were not made to her, and the individual who sold the shares to her had made no misrepresentation to her.

The VICE-CHANCELLOR, after referring to the facts of the case, proceeded:—

The question is, whether Miss *Worth* has a right to say that there has been such misrepresentation made to her by the company that, as between herself and the company, she is not to be a contributory of the company. On this question reference has been made to what I said in *Brockwell's Case (a)*.

Now that there may be no misapprehension as to the ground on which I acted in deciding *Brockwell's Case*,

(a) *Ante*, p. 205.

(c) 4 Jur. N. S. 1042.

(b) 3 De Gex & Sm. 92.

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I may say that that decision was to the effect, that if a company consisting of a number of shareholders, or a partnership consisting of only two or three, enter into a contract with another person, and the whole body represent to that person something which is false, on the faith of which representation that person enters into the contract, upon the commonest principles of justice and equity, the contract cannot be enforced against the person who has been led into it by misrepresentation. Whether it is a single individual making the representation or several persons appears to me to make no difference whatever, and therefore the principle I went upon was this:—If there has been a dealing between the company and the person sought to be affected by it, and if the company, as a company, have made a false representation to that person, on the faith of which he contracted, the company cannot enforce it against that person; and the only question on which difficulty can arise would be whether the false representation made to the individual is to be treated as a representation made by the company. That is a fair question, and a great number of cases may be cited where a director or the secretary of a company or the vendor of shares has made misrepresentations; and then the answer has always been, that it is the representation, not of the company, but of an individual, and the company cannot be affected by it; but it was laid down in *The National Exchange Company v. Drew* (I do not say that the point was actually decided, but the opinion of some of the most eminent judges of the present day was expressed) that where there is a body like this, consisting of a great number of shareholders, and the directors make a report to the body at large in performance of their duty, then if such report contain a representation of the affairs of the company which is false, and if that is made

to a public and general meeting of the shareholders of the company, and is adopted by the company as the report of the directors by that general meeting, although there be no order to publish it, either by the directors or the body at large, yet from the very nature of the case it must be regarded as the representation of the company. It is not like the case of a partnership between two or three persons, and one being instructed to report on its concerns, reports to his two partners; for here was the managing body of a company reporting to the members at a general meeting; and of course the transactions that there take place will transpire and be made public. Therefore it appeared to me, upon the authority of those learned judges, that that report, made in performance of a duty to a general meeting, which in fact represented the whole company, amounted to such a misrepresentation, that where a person on the faith of the misrepresentation dealt with the company, and not with an individual shareholder of the company, but taking the shares direct from the company, the misrepresentation vitiated the transaction.

That was the principle upon which I decided *Brockwell's Case*. There was in effect an appeal from that decision in *Nicoll's Case*, and some difference of opinion was expressed upon it; but I think that the balance of opinion is in favor of the view I then took, and to which I still adhere. In the first place it was a dealing between *Brockwell* and the company, it was not a dealing between *Brockwell* and another person; and secondly, it was upon the faith of a representation of the company to the public, and to *Brockwell* as one of the public, which turned out to be false, and was an intentional misrepresentation.

In the present case we have nothing at all approxi-

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inating to those circumstances. Miss *Worth* has not been dealing with the company at all. She was not induced to take the shares by any misrepresentation made to her by the company, or made by the company to the public, and which she had a right to take advantage of as one of the public. It was arranged between the directors and the shareholders at a meeting that certain shares should have a preference. They thought they could give a preference; and Mr. *Fry* took the shares, and afterwards represented to Miss *Worth*, believing it to be true, that she would be entitled to a preference of 6l. per cent. out of the profits. But how is that a fraudulent statement made to her by the company?

It appears to me therefore that there is nothing here that leads to any other conclusion than that Miss *Worth* has taken shares that render her liable as a contributory. She took them under the impression that she would have a preference in the division of the profits, but that does not prevent her being liable in respect of the shares. If she can show misrepresentation on the part of Mr. *Fry*, she may perhaps have a remedy as against him; but she is not on that account discharged from being a contributory of the company. She must therefore be put upon the list of contributories.

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March 19, 21.

*Contributory.
Declaration of
Forfeiture of
Shares by
Directors.*

In re THE NATIONAL PATENT STEAM FUEL
COMPANY. BARTON'S CASE.

THIS was a summons adjourned from chambers. The question was whether *Vincent James Barton* had been relieved from all liability in respect of certain shares which he had taken in the *National Patent Steam Fuel Company*, by reason of those shares having been declared forfeited by the directors.

The case was heard upon admissions.

It was admitted that Mr. *Barton* applied for shares, that 100 shares were allotted to him, and that he paid the deposit. That he never signed the deed of settlement nor attended any meeting of the shareholders of the company. That prior to the month of October, 1853, Mr. *Barton* had sold the shares allotted to him in the market, but without giving any notice thereof to the company or effecting any transfer.

In October, 1853, the directors of the company ordered a notice to be inserted in the newspapers and to be sent to the shareholders that those shareholders who had not signed the deed of settlement of the company in respect of the shares held by them were required to execute the same on or before Monday the 21st of November next, or in default the shares would be absolutely forfeited.

On the 29th of December, 1853, an annual general meeting of the company was held, and it was resolved—

There is no inherent power in the directors or in a general meeting of the shareholders in a company to declare a forfeiture of shares.

Therefore a person who had taken shares, but had not signed the deed, and whose shares had been declared forfeited by the directors with the sanction of a general meeting of the shareholders, was not relieved from his liability as a contributory, the forfeiture being *ultra vires*, and the directors not being expressly empowered by the deed to forfeit shares.

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"That the question of the forfeiture of those shares for which the deed of the company has not yet been signed be considered and determined at a special meeting of the shareholders to be held on Thursday the 27th of April next."

The meeting for the 27th of April was adjourned to the 4th of May, 1854, and at that meeting it was resolved—

"That the whole of the shares for which the deed of settlement of the company will not have been signed on or before the 31st of May, instant, be thereafter absolutely forfeited."

At the same meeting the directors reported that they had re-issued certain of the forfeited shares, and that there was still a number unallotted, and it was resolved—

"That the re-issue of the forfeited shares of the company at 6*l*. per cent. preference interest per annum be and is hereby confirmed," and the directors were authorized to re-issue the remaining forfeited shares of the company.

The directors in a circular to the shareholders dated 12th July, 1854, stated that "about 2,000 shares on which 1*l*. per share has been paid have been forfeited in conformity with the resolutions passed at general and extraordinary meetings of the shareholders, and to this extent the company has been benefited."

The company was dissolved in 1856, and a winding-up order subsequently obtained. It was admitted that

prior to the date of the winding-up order the business, property and effects of the company were sold to and transferred to another company with limited liability.

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There was no power given by the deed of the company to the directors to forfeit the shares of original shareholders, but by the 67th section of that deed it was provided, that in case any transferor of shares should neglect to execute the deed within three calendar months after the transfer to him his shares should be immediately and irredeemably forfeited to the use of the company.

Mr. *Glasse* and Mr. *Baggallay* for the official manager.

The forfeiture clauses of the deed of settlement of this company do not apply to original shareholders.

There is no inherent power in a company to forfeit shares, and although the directors have declared certain shares forfeited, in so doing they acted *ultra vires*, and that cannot relieve Mr. *Barton* from his original liability in respect of his shares: *Harris v. North Devon Railway Company* (a); *Clarke v. Hart* (b); *Ex parte Foote* (c); *Beresford's Case* (d); *Ex parte Baily* (e).

The fact of Mr. *Barton* never having signed the deed of the company does not alter the case. In many cases shareholders who have not signed the deed or attended meetings have been held liable as con-

(a) 20 Beav. 384.

(b) 6 H. L. C. 633.

(c) 32 L. T. 69.

(d) 2 Mac. & G. 197.

(e) 20 L. J. 145.

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tributories: *Mansfield's Case* (a); *Cookney's Case* (b);
Yelland's Case (c); *Hawkin's Case* (d); *Blackburn's*
Case (e).

Mr. *Baily* and Mr. *Waley* for Mr. *Barton*.

The original liability of Mr. *Barton* is not disputed, but the acts of the directors have relieved him from that liability. Although the acts of the directors may have been *ultra vires* and void as between shareholders, yet in the present case Mr. *Barton* had not signed the deed, and therefore was external to the company, and with regard to all persons in that position the shareholders must be represented and governed by the acts of their directors.

Since the year 1854, when the shares were declared forfeited, up to and even during the winding-up of the company, no communications were made to Mr. *Barton*, and he was treated as no longer a shareholder of the company; and had the company been as successful as it has been unsuccessful Mr. *Barton* could not have enforced his rights as a shareholder to a share of the profits. It would therefore be inequitable on the ground of want of mutuality to enforce Mr. *Barton's* agreement to become a shareholder by placing him on the list of contributories: *Goldsmids' Case* (f); *Prendergast v. Turton* (g).

Where the obligation of an allottee of shares rests upon contract, and he has not yet assumed the character

(a) 2 Mac. & G. 57.

(b) 28 L. J. 12.

(c) 5 De G. & Smale, 395.

(d) 2 Kay & J. 253.

(e) 3 Drew. 409.

(f) 16 Beav. 262.

(g) 1 Y. & C. C. C. 98.

of shareholder by signing the deed, the necessity of the case requires that there should not be the same strictness with relation to the transfer of shares to a purchaser that exists in the case of a complete shareholder. Thus the allottee of shares is permitted in practice to deal with his shares, and a purchaser from him is recognized by the directors of the company as a shareholder in his place. And the necessity of the case requires relaxation of the principle in regard to the forfeiture of shares similar to that which exists in the case of transfer. This difference was recognized by Lord *Cranworth* in the case of *Ex parte Beresford (a)*, and in a passage towards the close of his judgment Lord *Cranworth* in speaking of the proposition, where a joint-stock company is trading under a deed their shares can only be forfeited or transferred in the mode pointed out by the deed, says, "but that doctrine is not applicable in a case like this, where the party holding what are inaccurately called shares has never executed the deed so as to be strictly a shareholder. Mr. *Beresford* had a right to become and perhaps might have been compelled to become strictly a shareholder. Until however he had clothed himself with that character he was merely connected with the company by contract, and when he on the one hand and the directors on the other agreed to put an end to that contract and the relations arising out of it on certain terms it was competent to them so to do, and all further connection between them ceased."

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The VICE-CHANCELLOR :

This is a case in which *ex concessis* by his acts Mr. *Barton* has become not an actual and complete share-

(a) 2 Mac. & G. 197.

N N 2

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holder, but has put himself under an obligation which might have been enforced upon him to become a shareholder. He became liable to be put upon the list, and liable to be compelled to execute the deed and make himself a complete shareholder. He did not execute the deed, and when called upon to do so, he either declined or neglected to execute it.

The company was completely registered on the 21st of September, 1852, and it was previously to that registration that Mr. *Barton* had put himself in this position; so that at the time when the company was completely registered the directors might and were bound to compel him, and other persons who were in a similar position, to execute the deed and become shareholders.

In October, 1853, the directors came to a resolution intimating an intention that the shares of those who did not execute the deed should be forfeited. Now there is no power of forfeiture whatever in the deed of the company. There is not only no power of declaring the shares of persons who do not execute the deed forfeited, as in *Beresford's Case*, but there is no power to compel the forfeiture of the shares of parties who would not pay calls or perform the other obligations imposed on them. There is only a clause, which it is admitted does not apply to the present case. That is the 67th clause, and that does not embrace the case of persons who were original shareholders. Under these circumstances the directors thought fit in perfect *bona fides* to resolve that the shares of those persons who did not execute the deed by a certain time should be forfeited, and a circular notice to that effect was issued. In the November following there was a resolution that there should be an advertisement inserted in the news-

papers, and in December, 1853, there was an annual meeting, at which it was resolved that the question of forfeiture of the shares should be considered at a special meeting in the month of April following. That meeting was adjourned to the 4th of May, when a resolution was passed for the forfeiture of the shares of the persons who did not sign before the 21st of May following. At a meeting held in July, a report was made by the directors to the shareholders, stating that they had declared forfeited the shares of those who had not executed the deed at the time fixed, and they recommended the re-issue of the forfeited shares. There appear to have been about 2,000 shares forfeited, and no doubt it was intended to include Mr. *Barton's* shares among them.

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In January, 1855, there was an annual general meeting, at which there was a report, stating that there was a re-issue of the forfeited shares, but that about 1,300 remained unissued, and there was a resolution confirming the re-issue, and a list of the shareholders was sealed, which did not include Mr. *Barton's* name; and the intention of the Directors and of Mr. *Barton* at that time was that his shares should be forfeited.

But then comes the question, can I say that directors have an inherent right of forfeiture? I apprehend they have not; unless there be in the deed a clause authorizing them to forfeit shares, the directors have no power by which they may do so.

Then the distinction is very justly taken between Mr. *Barton's* case and many of the cases which have been

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referred to, namely, that Mr. *Barton* was not a shareholder properly constituted. He was only a person whose connection with the company was one of contract. He was under a contract to become a shareholder, and there is clearly that distinction between his position and that of a shareholder?

But does that state of circumstances give the directors a greater power to deal with those shares, so far as relates to the question of forfeiture, than if Mr. *Barton* had been a shareholder?

I should be very glad to find an authority justifying me in deciding in favor of the shareholder, but no decision whatever can be produced. Under these circumstances it is very difficult for me to say that I will for the first time introduce such a principle; because if the intention was that the directors should have the power to deal differently with those persons who have agreed to become shareholders than with those who are actual shareholders, that power would have been inserted in the deed. In *Beresford's Case* there was the express power. In this case there is no such power; and can I say, although I cannot introduce a clause as to those who have become complete shareholders, that I will introduce such a clause as to those who have not made themselves complete shareholders by executing the deed?

But it has been contended, that, from the language of Lord *Cranworth*, in *Beresford's Case*, it may be inferred that there was in the mind of that judge the distinction which is here contended for; and there is no doubt that that language does to some extent justify the

contention; but the language does or does not justify the contention according as you interpret the words, "it was competent for them," that is the directors, "so to do." What does that mean? Did Lord *Cranworth* mean to lay down a general proposition that it was competent for all directors so to do. It would be too strong to say that these words must have that interpretation; and I think I ought to put this interpretation on them, taking what precedes and what follows, that it was competent to those directors, under the circumstances in which they were placed, and having regard to the deed, to do as they did. Now in that case there was a special clause authorizing the directors to declare forfeited the shares of those persons who had not within a certain period executed the deed. But then that clause only applied to the persons named in a certain schedule, and it happened that there was no schedule, and the question was whether that was such a matter of exigency as that they could not exercise their power of forfeiture because there was no schedule. I came to the conclusion when that case was before me in the Master's office, and the present Lord Justice Knight *Bruce* and the Lords Commissioners came to the conclusion, that that made no distinction. There was that irregularity; but another question arose which does not arise here, whether the forfeiture, if it operated at all, operated as a complete discharge of the shareholder from all past and future liability.

It appears to me that I cannot put such an interpretation upon that judgment of Lord *Cranworth* as that it would justify me in saying that he meant to decide as an abstract proposition that, with or without power in their deed, the directors have an inherent power to deal

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THE NATIONAL
PATENT STEAM
FUEL CO.
BARTON'S CASE.

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*In re*

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with persons in the position of shareholders in this way. And therefore I must come to the conclusion (although reluctantly) that Mr. *Barton* has not been discharged from his liability. I cannot help feeling that if I were to deal with the question on the principle of general equity, there has been such a dealing between the parties that one could have no claim upon the other. But I think that principle of general equity does not apply here; and therefore I can only say that Mr. *Barton* must be settled on the list of contributories of this company.

NOTE.—The Lords Justices on appeal, April 16, 18, affirmed the decision of his Honor the Vice-Chancellor in this case.

1859:
April 16.

ELRINGTON v. ELRINGTON.

MR. PHILLIPS appeared in support of a petition for the payment out of Court to the Petitioners of a sum of 2,289*l.* 5*s.*

Practice.
Payment of
Fund to Widow.
Affidavit of no
Settlement.

Thomas Elrington, the testator in the cause, by his will dated 9th July, 1809, gave to his trustees a sum of 2,289*l.* 5*s.*, upon trust to pay the income to his four daughters for their lives, and after the decease of the survivor, to divide the principal equally among the testator's grandchildren then living.

Upon a petition by a widow for payment out of Court of money, to the payment of which she has become entitled since the death of her husband, the Court requires an affidavit that no settlement was made on her marriage with her late husband.

A suit was instituted for the administration of the testator's estate, and the trustees paid the above fund into Court.

The survivor of the four daughters having died, an inquiry was directed to ascertain who were the grandchildren of the testator *Thomas Elrington* then living.

By a certificate made in 1858, it was found that the present Petitioners were the grandchildren of the testator entitled to the fund.

One of the Petitioners, *Sarah Houston*, was a widow, her husband having died in 1854, but no affidavit was produced that no settlement had been made on her marriage.

The VICE-CHANCELLOR said an affidavit must be produced by *Sarah Houston*, who was a widow, that no settlement had been made on her marriage with her late husband.

1859 :
April 21.

*Set-off.
Costs of
Application.*

**BRYON v. METROPOLITAN SALOON OMNIBUS
COMPANY.**

Where a Plaintiff had been ordered to pay costs to Defendants and Defendants issued execution for those costs, but the sheriff had made no return on the writ, and the same Defendants were subsequently ordered to pay the Plaintiff costs of a less amount, the Court granted the Defendants leave to set-off the costs the Defendants had been ordered to pay the Plaintiff on the Defendants undertaking not to levy more on the execution than the balance of costs remaining due to them after such set-off.

The Defendants not having asked for a set-off when the order against them for costs was made, the Court made the order for a set-off without costs.

THIS was a motion by the Defendants for leave to set off the costs ordered to be paid by them to the Plaintiff under an order dated the 26th of March, 1859, against the costs ordered to be paid by the Plaintiff to them under an order of the 21st of July, 1858.

On the 21st of July, 1858, the Plaintiff moved for an injunction to restrain the Defendants, the *Metropolitan Saloon Omnibus Company*, from issuing any debentures or securities whereby the stock and assets might be charged or made liable for the payment of any sum of money borrowed for the use of the company.

Upon the hearing of this motion, the Court refused to make any order except to order that the Plaintiff should pay the Defendants their costs incurred by the application. These costs amounted upon taxation to 81*l.* 2*s.* 8*d.*

An appeal was pending on the part of the Plaintiff against this order of the 21st of July, 1858.

On the 26th of March, 1859, a motion was made on behalf of the Defendants to dismiss the Plaintiff's bill for want of prosecution. This motion was dismissed with costs to be paid by the Defendants to the Plaintiff. These costs amounted to 21*l.* 19*s.* 2*d.*

It appeared that previously to the 26th March, 1859, the Defendants had issued process against the Plaintiff for the costs incurred on the application in July, 1858, and that the writ was still in the sheriff's hands, but no return had been made thereon.

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The Defendants made an affidavit in support of their application to the following effect:—"That although efforts have been made by the Defendants, the *Metropolitan Saloon Omnibus Company, Limited*, to obtain payment of the costs ordered to be paid by the Plaintiff to the last-named Defendants, pursuant to an order made in the cause on the 21st day of July, 1858, yet those efforts have been ineffectual, and the whole of the last-mentioned costs still remains unpaid."

This affidavit was sworn only the day before the application was made.

Mr. *Graham Hastings* for the Defendants in support of the motion.

The Defendants are entitled to have the costs they have been ordered to pay the Plaintiff set-off against the costs ordered to be paid by the Plaintiff to them. The Plaintiff was ordered to pay the costs to the Defendants last July, and the Defendants have been unable to obtain the payment of those costs, and it is not probable that they will ever be paid. The fact that the Defendants have issued process against the goods of the Plaintiff in respect of those costs does not deprive them of their right to a set-off, as that process was issued before the costs which the Defendants have been ordered to pay, and which they now apply to set off, were incurred.

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The equity to set off costs has been recognized in the cases of *Cattell v. Simons* (a); *Lee v. Pain* (b); *Hawkins v. Hall* (c); and there has been nothing in this case which disentitles the Defendants to that equity.

Mr. *Glasse* for the Plaintiffs.

Admitting the general principle of set-off as contended for by the Defendants, there are special circumstances in this case which deprive the Defendants of such an equity. The Defendants have issued execution against the Plaintiff in respect of the costs against which they seek a set-off, and have thus debarred themselves of that benefit. The writ is still in the hands of the sheriff. No return has been made upon it, and *non constat* that the execution has not already been levied. Moreover, the order of Court under which the costs were payable to the Defendants is now under appeal, and therefore there is no conclusive order on the Plaintiff to pay those costs. Nothing was said about a set-off when the order was made, nor at the time of taxation, and the Defendants cannot now come and claim a set-off. The Defendants, not having applied for a set-off when the order against them for costs was made, must, even if they succeed, pay the costs of the present application.

Mr. *Graham Hastings* in reply.

THE VICE-CHANCELLOR :

In the present case an order was made sometime since directing that the costs of a certain motion which was

(a) 6 Beav. 304.

(b) 4 Hare, 256.

(c) 4 My. & Cr. 280.

refused with costs should be paid by the Plaintiff to the Defendants. For these costs, amounting to about 81*l.*, process was issued. It appears, however, that up to the present time nothing has been paid. There is, however, nothing at present to show me that nothing may be levied against the Plaintiff. At the time when the writ was issued, the order for the payment of costs by the Defendants had not been made, and if the writ had been returned *nulla bona*, there would have been no difficulty, and the matter would have stood in the same position as if the process had never been issued.

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It has however been contended that the order against Plaintiff to pay the 81*l.* costs is under appeal, and that therefore there is no conclusive order as against them. But the appeal does not in the least prevent the writ being executed, unless a special order to that effect is made by the Judge who made the order.

If the writ had not been issued, or had been returned *nulla bona*, I should have felt no difficulty, but I cannot now assume that it will be so returned. If there is a right of set-off there will still remain 60*l.* to be levied for, and the Defendants may limit the execution to that amount.

I think therefore that the Defendants are entitled to set off the costs they have been ordered to pay the Plaintiff on giving an undertaking not to levy more than 60*l.*, being the amount of costs payable by the Plaintiff to them after such set-off.

With regard to the question of costs of this application. From the language of Lord *Langdale* in *Cattell v. Simons* (a), I should infer that that Judge

(a) 6 Beav. 304.

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 ~~~~~  
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considered it right to compel the party against whom the application for a set-off was made to pay the costs of the party making it. I do not however consider that consistent with justice. The Defendants, when the order against them to pay costs was made, should have asked for a set-off of those costs. But on the other hand, I do not think the party against whom the application is made should have costs. The order for a set-off must therefore be made without costs on either side.

1859 :  
 May 11.  
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 Service.
 Assignor of
 Fund in Court.

BRIANT v. DENNETT.

Upon a petition by an assignee for the payment out of Court of a fund standing to the credit of an assignor, the Court requires the assignor to be served, unless there has been an *absolute* assignment of the *precise* fund, even where the total funds assigned exceed the fund in Court.

THIS was a petition by the assignee of part of a share in a fund to which the assignor was entitled, and which had been paid into Court to the separate account of the assignor, for the payment of the fund out of Court, and the question was, whether the assignor should have been served with the petition.

William Hicks by his will, dated the 22nd day of September, 1822, gave all his real and the residue of his personal estate to trustees upon trust to convert the same into money, and as to one moiety thereof to pay the annual dividends and income to his nephew *Edward Hicks Fielder* for his life; and after his decease the testator gave the same unto all and every the children and child of the said *E. H. Fielder*.

The trustees, after the testator's death, converted the

trust estate into money, and one moiety of the same amounted to 5,314*l*.

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Edward Kirby Fielder, as one of the sons of *E. Hicks Fielder*, being entitled to a share in this sum of 5,314*l*. upon the death of his father, by three indentures dated the 22nd of February, 1851, the 16th of July, 1851 and the 4th of August, 1852, assigned to *Edward Hicks*, the Petitioner, his executors, administrators and assigns, three several sums of 300*l*, 100*l*. and 300*l*. "part of the share of him the said *E. K. Fielder* in the sum of 5,314*l*. expectant on the decease of his father the said *E. H. Fielder*, and all dividends, interest and annual produce to arise therefrom, from and immediately after the decease of the said *E. H. Fielder*." In each of the three indentures was contained a power of attorney to the Petitioner to sue for and receive the same.

E. H. Fielder, the father of the Petitioner, died on the 8th of April, 1858, leaving six children.

A suit having been instituted for the administration of the estate of *William Hicks*, under whose will *E. K. Fielder* was entitled to the fund in question, the one-sixth share to which *E. K. Fielder* was entitled was ordered to be paid into Court to the separate account of *E. K. Fielder*.

The Defendant *E. K. Fielder* being in *Australia* was not served with the petition.

Mr. *Hobhouse* in support of the petition submitted, that the assignment being absolute and there being a

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power of attorney contained in the deeds, it was not necessary to serve Mr. *E. K. Fielder*. It was different from a case of foreclosure, as here nothing beyond the deed was asked for.

Mr. *Glasse* for the Defendant *Edward Dennett*, the surviving trustee by whom the money was paid into Court, consented, and stated that the Defendant *Dennett* had not any notice of any other incumbrances on the fund.

The VICE-CHANCELLOR said the assignment, though an absolute one, being an assignment not of the whole fund but only of a share in a fund, the Defendant *E. K. Fielder* must be served, and the petition must stand over for that purpose.

1859:
Jan. 18, 20 and
March 8.

Will.
Construction.
Shifting
Clauses.

LAMBARDE v. PEACH.

THE principal questions in this cause turned upon the construction of the will of *Robert Bell Livesey*. *Robert Bell Livesey* made his will dated the 19th of May, 1830, and thereby he gave and devised his manor of *Kildale*, in the county of *York*, with the advowson, manor-house, &c. to two trustees, their executors, administrators and assigns, for 1,000 years, on certain trusts, and subject thereto to the use of his wife *Jane Livesey* for life, without impeachment of waste; remainder to the use of his daughter *Marianne*, the wife of *Edmund Turton*, for life, for her separate use; remainder

Edmund Turton was tenant for life of the *Turton* estate, and his eldest son *Edmund Henry Turton* was tenant in tail expectant. *Robert Bell Livesey* devised his real estates upon several series of limitations for life, with remainder

to the sons of the tenant for life in tail, and among those limitations was a limitation for life to *E. H. Turton* for life, remainder to trustees to preserve, remainder to his second and other sons in tail.

Then followed several limitations, and among them was a limitation to the Plaintiff for life; and he concluded by a proviso, that in case *R. C. Turton*, one of the tenants for life, or the heirs of his body, or any other tenant for life or in tail, should become seised of the settled family estates of *Edmund Turton*, then the limitations of his will in favor of such persons should cease, as if he, she or they were dead, and the estates so limited were to go to the persons next entitled in remainder, it being his will that both the estates should not vest in the same person, except as was otherwise hereinbefore provided. And there was no such express provision in the will.

In the events which happened, *Edmund Henry Turton*, the eldest son of *Edmund Turton*, became seised of the *Turton* estates, and was the person (if it had not been for the proviso for cesser) entitled as tenant for life of the devised estates. He had no second or third sons, and he entered into possession.

The next limitation in terms was to the trustees to preserve, and the next tenant for life was, in the events, the Plaintiff.

Held, that *Edmund H. Turton* was not excepted out of the proviso by the concluding paragraph of it, and that the persons entitled were the trustees to preserve contingent remainders for the unborn second and other sons of *Edmund Henry Turton*.

(And see general propositions laid down at the conclusion of the judgment.)

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to the use of *Edmund Turton* for life; remainder to the use of *R. C. Turton*, the second son of *Edmund* and *Marianne Turton*, for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the first and successive sons of *R. C. Turton* in tail male; remainder to the third, fourth and every other son of *Edmund* and *Marianne Turton* in tail male; remainder to *Edmund Henry Turton*, their eldest son for life, without impeachment of waste; remainder to trustees to preserve; remainder to the use of the second and other sons of *Edmund Henry Turton* in tail male; remainder to the first and other sons of *Marianne Turton* by any future husband in tail male; remainder to the Plaintiff *Marianne Teresa Lambarde*, the eldest daughter of *Edmund* and *Marianne Turton*, and her assigns, for life; remainder to trustees to preserve; remainder to his sons and daughters in tail male, and to the daughters of Mrs. *Lambarde* by any future husband in tail male; remainder to the use of the daughters of testator's grandson in tail male, in every respect as thereinbefore limited (it being the testator's intention, that after failure of male issue of grandsons and granddaughters, the settled hereditaments should revert to the male issue of his second grandsons and granddaughters in tail male, as was declared of the male issue); with remainder to the use of testator's nephew *John Bell*; with remainder to trustees to preserve; remainder to his second and other sons in tail male; with other remainders over, and an ultimate limitation to the testator's own right heirs. *And the testator declared that in case the said R. C. Turton, or the heirs of his body, or any other tenant for life or in tail, should become seised of the settled family estates of the said E. Turton, then and from thenceforth the limitations thereby made in his, her or their favor should, from the time of his, her or their becoming so seised,*

ceuse and determine and be absolutely void as if he, she or they were dead; and the said thereby devised hereditaments and real estate, with the appurtenances, should go over to the person next entitled in remainder under and by virtue of his said will, it being his express wish and intention that both the said estates should not vest in the same person except as was otherwise therein-before provided (there was no express exception). Then followed trusts of the terms and powers to the trustees. The tenants for life had all jointuring powers, and powers to charge for younger children.

The testator made a codicil to his will on the 6th of November, 1831, and thereby revoked the life estate given to *Edmund Turton*, and substituted for it an annuity.

At the time of making his will and at his death, the testator had living his wife *Jane Livesey*, one child *Marianne*, the wife of *Edmund Turton*, and three grandchildren (the children of Mr. and Mrs. *Turton*), viz.—*Edmund Henry Turton* the eldest son, *Robert Consett Turton* the second son, and one daughter *Marianne Teresa Turton*, afterwards Mrs. *Lambarde*; and he had a nephew *John Bell*. The testator was the owner of the *Kildale* estates. *Edmund Turton* was in possession of the *Turton* estates, and *John Bull* was in possession of the *Bell* estates; and it was arranged for the purpose of the hearing, that the Court should assume that *Edmund Turton* was tenant for life of the *Turton* estates. The testator died on the 15th of November, 1831, and thereupon *Jane Livesey*, his widow, entered into possession of the *Kildale* estate.

She died 17th of October, 1846, and thereupon *Marianne Turton*, the testator's daughter, entered into possession of the *Kildale* estate. She died in May,

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1858, her husband having died in March, 1857. On the death of *Marianne Turton*, the person who would have been, according to the limitations in the will, entitled to the possession of the *Kildale* estate if he had been alive was *R. C. Turton*, the second son of Mr. and Mrs. *Turton*, but he had died an infant without issue on the 17th of November, 1831. Next to him in the order of limitations in the will (as there were no other sons of Mr. and Mrs. *Turton*) was *Edmund Henry Turton*, the principal Defendant, who according to the limitations in the will was next-tenant for life. And he entered into possession, wrongfully as the Plaintiff contended, inasmuch as on the death of his father *Edmund* in 1857, he had become seised of the *Turton* estate, and therefore the Plaintiff contended that the event had happened which was provided for by the shifting clause, upon the happening of which the limitation made by the will in his favor was to cease and determine, and the devised estate to go over to the person next entitled in remainder under the will, who was the Plaintiff, unless the trustees to preserve, who were in point of order the next in remainder, were entitled.

The Defendant on the other hand contended that he was entitled notwithstanding the shifting clause.

Sir *R. Bethell*, Mr. *Glasse* and Mr. *Welford* appeared for the Plaintiff.

The *Solicitor-General* and Mr. *Hobhouse* for the Defendant *W. H. Turton*.

Mr. *Baily* and Mr. *Chichester* for the trustees took no part in the argument.

The arguments of counsel are so fully referred to in the judgment that it is unnecessary to report them.

The following cases were referred to:—*Doe v. Heneage* (a); *Stanley v. Stanley* (b); *Carr v. Lord Erroll* (c); *Morrice v. Langham* (d); *Monypenny v. Dering* (e).

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On the 8th of March the VICE-CHANCELLOR delivered the following judgment:—

The Defendant *Edmund Henry Turton* insists, in the first place, that the shifting clause does not apply to him.

Judgment.

The first question therefore is, whether the shifting clause is to be held to apply to *Edmund Henry Turton*.

[His Honor referred to the clause set out in p. 554].

Now it is perfectly clear that, according to the plain meaning of this language, *Edmund Henry Turton* is one of the persons coming within the description “any other tenant for life or in tail.” He is a tenant for life under the limitations contained in the will, and is therefore clearly within the express words of the shifting clause. What is desired on the part of *Edmund Henry Turton* is, that the Court should in effect introduce into the will an exception in his favor, exempting him from the operation of the clause. If this is to be done, it must be by reason of something to be collected from the will, leading irresistibly to the conclusion, that the testator could not possibly have meant him to be included among the persons to whom the clause was to apply.

(a) 4 Term Rep. 13.

(b) 16 Ves. 491.

(c) 6 East, 58.

(d) 11 Sim. 260; 8 M. &

Wels. 194; Co. Litt. 378.

(e) 2 De G., M’N. & Gord.
 145.

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The following are the grounds on which the Defendant contends that the testator did not intend the clause to apply to him.

1st. It is said that if the shifting clause is held to apply to *Edmund Henry Turton*, he never could by possibility take any benefit from the devised estate; for he would come into possession of the *Turton* estate on his father's death; and under the limitations of the will he could not come into possession of the devised estate till after the death of the survivor of his father or mother, so that he never could be in possession of the devised estate for a single moment without having also become seised of the *Turton* estate; therefore the instant he became entitled in possession to the devised estate under the limitations, the shifting clause (if it applies to him) would cause it to pass away from him. The result of this would be, that he could not exercise the powers of jointuring and charging portions for younger children which were given to all the tenants for life.

Now it is perfectly true that such would be the result of holding that the shifting clause applies to *Edmund Henry Turton*, but it does not appear to me that this is a sufficient reason for holding that the testator meant to exempt him from the operation of the clause, which in its express terms applies to him. In truth, the argument resolves itself into this: as the effect of the shifting clause, when applied to *Edmund Henry Turton*, is, that he can never enjoy the devised estate for a single day, why did the testator include him in the limitations at all? If there were no other answer to this question, than that such was the testator's caprice, I apprehend that would be sufficient. But I think it was not unnatural that the testator should include him in the

limitations, although he would not derive any benefit therefrom. The testator meant that the devised estate should devolve on the second and other younger sons of *Edmund Henry Turton* in tail male; those limitations would, at least until *Edmund Henry Turton* should have a second son born, be contingent remainders, which would require an estate of freehold to support them; and accordingly the testator has limited an estate for life to *Edmund Henry Turton*, with a limitation (in case of the determination of that estate by any means in his lifetime) to trustees during his life in trust to preserve the contingent remainders; and thus the contingent remainders to the second and every other younger son of *Edmund Henry Turton* are effectually supported and preserved. It is true that this might have been done by limiting an estate to the trustees during the life of *Edmund Henry Turton* without limiting any estate to him at all; but the testator has chosen to produce the same effect by limiting an estate for life to *Edmund Henry Turton*, with a limitation to the trustees; and although the life estate to *Edmund Henry Turton* is barren of enjoyment, this mode of limitation presents a more uniform appearance with the other instances in which the testator has in this will limited an estate to trustees to preserve contingent remainders than if he had altogether omitted *Edmund Henry Turton*. And as to the argument that if the shifting clause be applied to *Edmund Henry Turton*, he could never exercise the powers of jointuring and charging portions, the answer is, that the proviso in the will which follows next after these powers is of itself sufficient to preclude him from exercising them.

2nd. It is next argued that according to the express terms of the shifting clause, the limitation made by the will in favor of any tenant for life becoming seised of

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the *Turton* estate is to *cease and determine*; and it is insisted that if the shifting clause is held to apply to *Edmund Henry Turton* he would not have any estate or interest in the devised estate which could *cease and determine*, for then the devised estate would never come to him.

This argument is founded on a fallacy. It rests on the assumption that the devised estate would never come to *Edmund Henry Turton* at all. This is a false assumption. The devised estate would *come* to him and did come to him, although it would not *remain* with him. He took a vested life estate in remainder by virtue of the limitations; but as soon as he became seised of the *Turton* estate, the shifting clause came into operation and caused his life estate to *cease and determine*.

3rd. The next argument is, that the testator has in the limitations of the estate postponed *Edmund Henry Turton* (though the eldest son) and his male issue to all the younger sons of Mr. and Mrs. *Turton* and their male issue, which he did, because he anticipated that *Edmund Henry Turton* would become seised of the *Turton* estate. The testator therefore having for that reason excluded him from his natural and proper place in the series of limitations and introduced him in a lower place, has shown that he did not intend that same reason to operate to his total exclusion, but that he intended it to operate only to the extent of his being postponed to the younger sons and their issue.

If this argument affords a sufficient reason for exempting *Edmund Henry Turton* from the operation of the shifting clause, it affords an equally sufficient reason for exempting therefrom his second and other

younger sons and their issue male; for they are equally excluded from their natural and proper place in the series of limitations, and are introduced in a lower place. And yet no one, I suppose, would contend that the testator intended that the second or any other younger son of *Edmund Henry Turton* might hold both the estates together.

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4th. The next argument is this:—The eldest son of *Edmund Henry Turton* is altogether passed over and omitted from the limitations of the devised estate. The testator intending to exclude him from all interest in the devised estate, because the testator anticipated that he would eventually come into possession of the *Turton* estate. The same reason would have induced the testator altogether to pass over and omit *Edmund Henry Turton* from the limitations, if he had intended the shifting clause to apply to him; for *Edmund Henry Turton* was even more certain of becoming seised of the *Turton* estate than his eldest son. This argument is very much of the same character as the first; for it resolves itself into this,—why did the testator include *Edmund Henry Turton* at all in the series of limitations? I do not think it necessary to repeat the answer.

5th. In the next place it is argued, that if *Edmund Henry Turton* had now an eldest and a second son, the devised estate would, according to the Plaintiff's contention, go to the second son, although the eldest son would not come into possession of the *Turton* estate till after the father's death; so that during the father's life his second son would be in possession of the devised estate, while the eldest son would be unprovided for till the father's death, and it is contended that this is a very improbable intention to attribute to the testator.

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I confess it does not appear to me so very improbable that such should have been the testator's intention, although the effect would no doubt be that during the father's life the second son would be better off than the first. At all events any such improbability cannot, in my opinion, prevail against the clear and express words used by the testator.

6th. The last argument to be noticed is this:—The testator at the end of the shifting clause declares it to be his wish and intention that both the estates should not vest in the same person, *except as was otherwise thereinbefore provided for*. And it is contended that there is not any case provided for by the previous limitations in which the two estates may vest in the same person other than the case of *Edmund Henry Turton*. Therefore it was not the wish and intention of the testator that both the estates should not vest in *Edmund Henry Turton*.

This argument appears to me to be founded on a false assumption. There is a case provided for by the previous limitations in which the two estates might vest in the same person, namely, the case of *Edmund Turton*, the father of *Edmund Henry Turton*. He was already in possession of the *Turton* estate; and the shifting clause cannot apply to him, because the words are "shall become seised of the settled family estates of the said *Edmund Turton*." It is true that by the codicil the life estate devised to *Edmund Turton* is revoked; but the words "except as is otherwise hereinbefore provided for" have reference to the terms of the will as it stood before the codicil was made, and not to those of the codicil.

Now I am far from thinking that the answers I have

suggested to the arguments on behalf of *Edmund Henry Turton* are such as to deprive them of all weight. Notwithstanding any answer that may be given to them, these arguments, at least some of them, still retain much of their force. But what is the extent of this force? Do they go to show that there is anything in the limitations of the devised estate so contradictory or repugnant or inconsistent with the shifting clause, if applied to *Edmund Henry Turton*, as to lead irresistibly to the conclusion that the testator could not have intended the shifting clause to apply to him? Far from it. Giving to those arguments their utmost weight and effect, they only result in this conclusion; that it is somewhat strange that the testator, intending the shifting clause to apply to *Edmund Henry Turton*, should have framed the limitations precisely as he had done, and that, consistently with that intention, it might have been expected that he would have shaped the limitations in a more skilful and workmanlike manner. This seems to me the utmost extent of the force belonging to those arguments; and this is wholly insufficient to prevail against the plain language of the shifting clause, by which it is made applicable to every tenant for life or in tail who shall become seised of the *Turton* estate, without any exception in favor of *Edmund Henry Turton*. The will no doubt contains in several places indications that its framer was not a very careful or experienced conveyancer; but the clumsiness of the draftsman is not to be used as a reason for getting rid of the clearly expressed intention of the testator. I am of opinion that the shifting clause must be held to apply to *Edmund Henry Turton*.

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I now come to the second and most material question in the cause, which is this:—

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On the death of Mr. *Turton* in March, 1857, *Edmund Henry Turton* became seised of the *Turton* estate, i. e. the event then happened upon which, by the operation of the shifting clause, the limitation of the devised estate in favor of *Edmund Henry Turton* ceased and determined. At that time his mother Mrs. *Turton* was tenant for life in possession of the devised estate. She died in May, 1858. And the question is, who upon her death became entitled to the devised estate.

Upon reading the testator's will, two things at least are clearly seen to have been intended by the testator; the one is, that the devised estate should go to the second and other younger sons of *Edmund Henry Turton* in tail male after their father's death, and before it should go to Mrs. *Lambarde* and her first and other sons in tail. About this intention there can be no shadow of doubt. The words are clear: "And from and immediately after the decease of the said *Edmund Henry Turton*, to the use of the second son of *Edmund Henry Turton* lawfully begotten, and the heirs male of the body of such second son lawfully issuing, and for default of such issue, then to the use of the third, fourth and all and every other the younger son and sons of the said *Edmund Henry Turton*, &c." Then follows a remainder to the use of the first and other sons of Mrs. *Turton* by any future husband in tail male, and not till after these limitations comes any limitation to the use of Mrs. *Lambarde* for life. The testator clearly intended that the devised estate should not go to Mrs. *Lambarde* till after failure of the second and other younger sons of *Edmund Henry Turton* and their issue male. And as the limitations to the use of the second and other younger sons of *Edmund Henry Turton* are contingent remainders, the testator has carefully guarded them from destruction by limiting an

estate to trustees and their heirs during the life of *Edmund Henry Turton*, upon the express trust to support and preserve those contingent remainders from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion may require. The existence then and the continuance of the estate of the trustees to preserve contingent remainders was a prominent and important design of the testator in order to effectuate his intention to give the estate to the second and other younger sons of *Edmund Henry Turton* in tail male. The other thing clearly intended by the testator was, that, except in the case of *Edmund Turton*, the devised estate and the *Turton* estate should never vest in the same person, and to effectuate that intention he has introduced the shifting clause. Now as it is a plain rule that any particular passage in a will is to be so construed as to give effect to the testator's clear intention collected from the whole will, so if two distinct intentions are clearly collected from the will, a particular passage ought to be so construed as if possible to carry into effect both these intentions. If indeed the case should arise in which it is impossible to effect both the intentions, of course one must be sacrificed to the other; but that is never to be done until every endeavour has been used to find such a construction as shall effectuate both. Let me apply this to the case now under consideration. *Edmund Henry Turton* having on his father's death become seised of the *Turton* estate, by the express terms of the shifting clause his life estate in the devised estates has ceased and determined. To whom then is the estate to go? What says the shifting clause? Its language is this,—“And the said hereby devised manors, advowsons, messuages, lands, tenements and real estate with the appurtenances shall go over to the person next entitled in remainder under and by virtue of this my

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will." What construction is to be put upon this language? Who is "the person next entitled in remainder under and by virtue of the will?" Mrs. *Lambarde* insists, that as all the prior tenants for life are dead, and as *Robert Conssett Turton* died without issue, and as there never was any other younger son of Mr. and Mrs. *Turton*, and as there is no second son of *Edmund Henry Turton*, and as there never was any son of Mrs. *Turton* by a second marriage, she, Mrs. *Lambarde*, is now the person to whom, according to the true construction of the clause, the estate is to go over as being next entitled in remainder under and by virtue of the will.

Let us consider what will be the effect of adopting this construction with reference to both the intentions which I have pointed out as being manifest on the face of the will. It does not, indeed, at all conflict with the one intention, that the devised estate and the *Turton* estate shall not vest in the same person. But it entirely defeats the other clear intention of the testator, viz., that the estate shall go to the second and other younger sons of *Edmund Henry Turton*. If Mrs. *Lambarde* is now the legal tenant for life in possession, as she insists that she is, the estate limited to the trustees during the life of *Edmund Henry Turton* in trust to preserve the contingent remainders is gone, and the contingent remainders to the second and other younger sons of *Edmund Henry Turton* are destroyed, and thus the clear and manifest intention of the testator in this respect is utterly defeated. Now of course if this is the necessary construction of the clause it cannot be helped, the consequences must follow. But is this the necessary construction? Is the language of the clause incapable of any other construction by the adoption of which the whole intention of the testator may be pre-

served? It must be observed that the words, "next entitled in remainder," mean next after the person whose estate and interest is to cease and determine. And it must be further observed, that it has long been settled that the estate to trustees to preserve contingent remainders is a good vested remainder. When therefore the estate for life limited to *Edmund Henry Turton* ceased and determined by reason of his having become seized of the *Turton* estate, who was in the most strict and accurate sense the person entitled in remainder next to him? Without doubt *James Serjeantson*, the survivor of the two trustees to whom the estate was limited during the life of *Edmund Henry Turton* in trust to preserve the contingent remainders. And by thus construing the clause, both of the intentions of the testator before referred to are preserved. His intention that the devised estate and the *Turton* estate should not vest in the same person is preserved, and so also is his other equally clear intention, that the devised estate should go to the second son of *Edmund Henry Turton* (if he should ever have one) in tail male. Here then we have two constructions of the passage offered to us, the one, that which is contended for by *Mrs. Lambard*, which would defeat one of the two intentions of the testator, and the other, that which would preserve them both. And according to principle, the Court ought to adopt the latter, and upon a review of the authorities to which I shall presently refer, I think it may be laid down as a general rule, that where (as in the present case) an estate for life is by will limited to one for life, with a limitation to trustees during his life in trust to preserve contingent remainders, followed by a limitation to any of his unborn sons in tail, and there is a shifting clause similar to that in the present case, by virtue of which the estate and interest of such tenant for life is made to cease and determine by the acquisition of

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another property or by succeeding to a title, or on any other similar event, and the estate is to go over to the person next entitled in remainder, the expression "the person next entitled in remainder" shall, in order to effectuate the testator's intention, be held to mean the trustees to preserve contingent remainders, if there be any contingent remainders to be preserved, although in a case in which there are no contingent remainders to be preserved, the construction may be different. In this case there are contingent remainders to be preserved, viz., the remainders limited to the second and other younger sons of *Edmund Henry Turton* in tail male. And therefore I must hold that as the event has happened upon which the life estate of *Edmund Henry Turton* has ceased and determined, the devised estate has become vested in *James Serjeantson*, the surviving trustee to preserve contingent remainders.

But a question still remains. Who under these circumstances is entitled to the beneficial enjoyment of the rents and profits? Not the trustee to preserve contingent remainders. He is clearly a mere trustee, and was never intended to have any beneficial enjoyment. Not Mrs. *Lambarde*, or any other person entitled after the expiration or failure of those contingent remainders which the trustees' estate is to support: there is no trust declared for her or them. Is, then, *Edmund Henry Turton*, the *quondam* tenant for life, entitled to the rents and profits? I apprehend certainly not. True it is, that in declaring the limitations of the devised estate the testator has declared that the trustees to preserve contingent remainders shall hold in trust to permit *Edmund Henry Turton*, during his life, to receive and take the rents, issues and profits of the devised estate for his own use and benefit; but by the shifting clause which follows, he has declared that in the event

(which has happened) of *Edmund Henry Turton* becoming seised of the *Turton* estate, the limitations by the will made in his favor shall cease and determine and be absolutely void as if he were dead, and has moreover expressly declared his intention to be that both the estates should not vest in the same person. Therefore, to hold that *Edmund Henry Turton* is entitled to the rents and profits of the estates now vested in the trustees to preserve contingent remainders would be to decide in direct contravention of the plainly declared intention of the testator; it would be merely changing his previous legal estate for life into an equitable estate for his life. The result is that the beneficial interest in the rents and profits of the devised estate since the death of *Mrs. Turton* in May, 1858, is undisposed of by the will, and consequently devolves by descent on the testator's heir-at-law. And it will be found when I come to examine the authorities that they are in accordance with this conclusion. The heir-at-law of the testator at his death was his daughter *Mrs. Turton*. Whether she made a will which would have the effect of disposing of this interest does not appear; if not, her eldest son and heir *Edmund Henry Turton* is now entitled to this beneficial interest. But, be it observed, if entitled, he is entitled not under the will but by descent. At all events it is sufficient for the purposes of this suit that I declare my opinion to be that *Mrs. Lambarde* is not entitled to these rents and profits.

I now proceed to examine the authorities on the subject:—

1st. *Doe v. Heneage* (a), before Lord *Kenyon* and *Buller* and *Grose*, JJ. The question arose on the will

(a) 4 T. R. 13.

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of *Thomas Heneage*. [After stating the facts of that case, his Honor proceeded:]—

The question was, whether upon *George Finch Heneage* becoming seised in possession of the uncle's estate, the devised estate did or did not go to the trustees to preserve contingent remainders. If it did not, then the contingent remainders to the first and other sons of *George F. Heneage* in tail male were defeated, and the estate devolved on *George F. Heneage* in fee as testator's heir, and the Plaintiff took nothing under the will. If the estate did go to the trustees to preserve, then the contingent remainders to the first and other sons of *George F. Heneage* were preserved, and the Defendant and Plaintiff became on their births successive tenants in tail male in remainder, and upon Defendant becoming on his father's death seised in possession of the uncle's estate, the shifting clause operated to cause his estate tail under his grandfather's will to cease, and the devised estate thereupon went over to the Plaintiff as being the next in remainder. The Court of Queen's Bench decided that on *George F. Heneage*, the tenant for life, becoming seised in possession of the uncle's estate, the devised estate passed under the shifting clause to the trustees to preserve contingent remainders, and so the contingent remainders to his first and other sons were preserved.

This is a strong case, because in order to arrive at this conclusion it was necessary to get over those words in the shifting clause, "And in such case my will and meaning is, that the next in remainder according to the uses of this my will shall succeed to and have and enjoy my said estate hereby devised as if my said son, *George F. Heneage* or any such son or sons of his was or were respectively dead." These were certainly difficult

words to get over, because if *George F. Heneage* had been actually dead, there would of course have been an end of the estate to the trustees to preserve contingent remainders, which was only to endure during the life of *George F. Heneage*. But the Court did get over those words in favor of the clear intention of the testator that the devised estate should go to the first and other sons of *George F. Heneage*. The Court seems to have considered that the first and other sons of *George F. Heneage* were those whom substantially the testator regarded as next in remainder to *George F. Heneage*, though they were unborn, and that the estate to the trustees was, in his view, a mere instrument for preserving the remainders limited to them, and as it were an appendage to those remainders. If *George F. Heneage* had actually died, the next in remainder would have been his first son if he had one. And in directing the estate to go to the next in remainder, as if *George F. Heneage* were dead, the testator intended that it was to go to his first son, if he should have one at his death, and that intention could only be accomplished by holding that the estate should go to the trustees to preserve the contingent remainders to the first and other sons; and so the Court held.

Besides the words I have mentioned as difficult to get over, there were in that case other words in the clause which also presented some difficulty, though not so great. The language of the shifting clause was, "The next in remainder shall succeed to and have and enjoy my said estate." The word "enjoy" seemed to point to some person or persons who should take the estate beneficially, and not to mere trustees to preserve contingent remainders. Yet the Court got over that difficulty in order to effectuate the testator's intention,

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that if ever *George F. Heneage* should have a son, the estate should go to that son in tail.

It is considered that some doubt was thrown upon the decision in *Doe v. Heneage* by a passing observation of Lord *Ellenborough* in *Carr v. Earl of Erroll*, which I shall presently consider. Unfortunately that case being decided upon a case sent out of Chancery, we have, according to the then practice, only the certificate without any reasons, and therefore it is impossible to know whether the Court did upon full deliberation still retain any doubt upon the decision in *Doe v. Heneage*; for upon examining *Carr v. Lord Erroll* it will be seen that the shifting clause was altogether different from that in *Doe v. Heneage*, and that the decisions in the two cases are perfectly consistent with each other. And though *Doe v. Heneage* has been cited in a great number of subsequent cases, I am not aware that it has ever been formally disapproved. But whether Lord *Kenyon* and the other judges who decided *Doe v. Heneage* were or were not justified in getting over the difficult words which occurred in the shifting clause in that case, no such difficulty is presented by the case now before me. The shifting clause in both cases consists (as it usually does) of two distinct branches, the one directing upon the happening of a certain event the cesser of the estate or interest limited to a party, and the other directing that the estate shall thereupon go over to the next in remainder. In *Doe v. Heneage*, the latter branch of the clause was in these terms, "And in such case my will and meaning is, that the next in remainder according to the uses of this my will shall succeed to and have and enjoy my said estate hereby devised, as if my said son *George F. Heneage* was dead." So that to this latter branch of the clause, directing that the estate should go over to

the next in remainder, there was added a direction that it should go to the next in remainder as if *George F. Heneage* was dead. And it was this last-mentioned direction that presented the difficulty, because if *George F. Heneage* was dead, the estate to the trustees to preserve contingent remainders, which was only to endure during his life, would have determined. In the case now before me this last-mentioned direction does not occur. For though it is true the words "as if he were dead" do occur in the shifting clause, they occur not in connection with the latter branch of the clause which directs that the estate shall go to the next in remainder, but in connection with the former branch which directs the cesser of the estate limited to the party becoming entitled to the other property. The terms of the shifting clause in the case before me are, "then and from thenceforth the limitations hereby made in his favor shall cease, determine and be absolutely void, as if he were dead; and the said hereby devised lands shall go over to the person next entitled in remainder," without adding "as if he were dead." So that the direction is, that his estate is to cease as if he were dead, but not that the lands shall go over to the next in remainder as if he were dead. This appears to me to be a substantial and important distinction. What is the meaning and operation of the words "as if he were dead," when added to the branch of the clause which directs the cesser of his estate? Simply to express in strong and unmistakeable terms the testator's intention that the estate of the tenant for life is to cease absolutely and entirely and to all intents and purposes. If he were dead, of course his estate would cease absolutely and entirely, and to all intents and purposes; and therefore the testator intending that the estate shall cease absolutely and entirely, and to all intents and purposes, illustrates his intention by saying, that it shall

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cease as if the party were dead, although he will not be actually dead. But those words "as if he were dead" having thus performed their function in the former branch of the clause which directs the cesser of the estate, what ground is there for carrying them on to the latter branch of the clause, which directs that the lands shall go over to the person next entitled in remainder? Why are we to construe this latter branch as if the testator had said that the lands shall go over to the person next entitled in remainder *as if the party were dead*, when in truth he had said no such thing? To do so appears to me to be nothing less than a gratuitous importation into the will of a direction which the testator has not inserted, and which so far from being required in order to effectuate any general intention of the testator, does in fact defeat it. So that even if the decision in *Doe v. Heneage* be open to reasonable doubt, the ground for such doubt does not exist in the case now under consideration. And even if *Doe v. Heneage* had been actually overruled (which it never has been) it would not cease to be deserving of notice as showing how strong is the disposition of a court of justice to get over difficulties in order to give effect to the testator's intention that the estate should go to the unborn son of the party whose estate is to cease and determine. The only expression in the shifting clause in the present case which presents any difficulty is the word "person" in the singular number, the words being "shall go over to the *person* next entitled in remainder," from which it may be argued that the testator could not have intended by that word "person" in the singular to express the *two* trustees to preserve contingent remainders. But I do not feel any hesitation in getting over that difficulty in favor of the clear intention.

I now come to the case of *Carr v. Lord Erroll* (a). This is a case in which there was no need to keep up the estate to the trustees to preserve contingent remainders, because the testator himself directed that on the happening of the event upon which the shifting clause was to come into operation, the contingent remainders as well as the life estate, were to cease, and therefore there were no longer any contingent remainders to be preserved. Here the shifting clause was very different from that in *Doe v. Heneage*, as well as from that in the case now before me; for by the very terms of the shifting clause itself, upon *William Hay* the tenant for life becoming *Earl of Erroll*, not only his life estate, but also the estate and use limited in remainder to his sons in tail, was directed to cease and determine; that is, the contingent remainders which the estate to the trustees was intended to support were at an end; and therefore the estate to the trustees was no longer needed in order to effectuate the testator's intention. Therefore the Court decided that *Lady Charlotte Carr* was the person next in remainder. This decision in *Carr v. Lord Erroll* does not in the least conflict with that in *Doe v. Heneage*.

The next case is *Stanley v. Stanley* (b) before Sir *William Grant*.—[His Honor stated the facts of that case.] There it was held:—1st. That *Thomas Massey* took a vested estate for life after an estate in the trustees for so many years as his minority might last. 2nd. That the question on the shifting clause must be decided in the same manner as if, instead of a direction to the trustees to convey to the uses mentioned, the devise had been direct to those uses. 3rd. That the trustees, in making the conveyance directed,

(a) 6 East, 56.

(b) 16 Ves. 491.

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had no power to mould or alter the limitations. Now in June, 1800, *Thomas Massey* had become possessed of the *Puddington* estate, and so the event had happened upon which his estate for life ceased and determined. At that time he had no son born, so the limitations to his first and other sons in tail male were then contingent remainders which required the existence of the estate in the trustees to support them. *Thomas Massey* attained twenty-one in January, 1804, up to which time there was no doubt the devisees in trust were to receive the rents and lay them out in the purchase of other estates. He had no son born till November, 1806, so that nearly three years elapsed between the time when his life estate under the will ceased and the birth of his first son. The first question then was, who upon the cesser of the life estate of *Thomas Massey* became entitled to the devised lands as the person next in remainder. It was contended by *John* the next brother and the next tenant for life under the limitations, that he was entitled. Now it is important to observe, that *John* in that case stood precisely in the same position as *Mrs. Lambarde* does in the present case. And what said Sir *W. Grant* to the claim of *John*? [His Honor here referred to the judgment commencing—"The question then is, &c.," page 509, to "the description of next in remainder."] Now this passage is a complete answer to the claim of *Mrs. Lambarde*. And it will be observed that the reason here given by Sir *W. Grant* for coming to that conclusion was, that under the protection of the estate of the trustees to preserve contingent remainders, the contingent remainders to the unborn first and other sons of *Thomas* were to be considered as subsisting remainders, so as to prevent *John's* answering the description of next in remainder. So in the present case,

under the protection of the estate of the trustees to preserve contingent remainders, the contingent remainders to the unborn second and every other younger son of *Edmund Henry Turton* are to be considered as subsisting remainders, so as to prevent *Mrs. Lambarde* answering the description of next in remainder.

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Sir *William Grant* goes on to observe—[His Honor referred to the passage commencing—"That was the answer given, &c." page 589, to "deny the authority of *Doe on demise of Heneage v. Heneage.*"]

Sir *William Grant* held that the trustees to preserve contingent remainders took the devised estate as next in remainder until the birth of a son of *Thomas*, and that such son became entitled on his birth as tenant in tail.

The second question was, who was entitled to the rents between the time when *Thomas* attained twenty-one and the birth of his son, and Sir *William Grant* held that they were undisposed of by the will and belonged to the testator's heir at law.

The next case to be noticed is *Morrice v. Langham* (a). The two reports in *Simons* and in *Meeson and Welsby*, though relating to a litigation between the same parties, do, in fact, relate to two totally different instruments containing different shifting clauses, and are to all intents and purposes two distinct and separate cases. *Francis Tutte* in 1804 executed a deed by which he settled freehold lands to such uses as he should by deed or will appoint, and in default of appointment to certain uses, with a shifting clause. In

(a) 11 Sim. 260; 8 Mees. & Wels. 194.

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1820 he made his will, by which in exercise of the power reserved to him by the deed, he appointed the same freehold lands, and also devised certain copyhold lands not comprised in the deed to certain uses altogether different from those of the deed, and with a different shifting clause. The question came before the Vice-Chancellor of *England* under the will as reported in *Simons*. His Honor decided the question as to the devised copyholds, and also partially decided as to the appointed freeholds, holding that a certain interest in those freeholds was undisposed of by the will, and that therefore the right to that interest must be governed by the deed, and he sent a case for the opinion of the Court of Exchequer on the deed, which case was of course framed upon the supposition that the power of appointment had not been exercised. So that in the report in *Mees. and Welsby* we have the decision of the Court of Exchequer upon the deed, and in the report in *Simons* we have the decision of the Vice-Chancellor upon the will. I will consider first the case in the Exchequer on the deed—*Morrice v. Langham* (a).

[His Honor stated the facts.]

On the 12th of May, 1812, *James Langham* became entitled in possession to the family estate of his father Sir *James Langham*: the questions for the opinion of the Court were,—1st, whether upon the death of *Francis Tutte* in January, 1824, *Herbert Langham* (the second son of *James Langham*, took any and what estate in the lands comprised in the deed, and 2ndly, whether *Langham Christie* took any and what estate therein. In one respect the shifting clause in this case resembles that in *Carr v. Lord Erroll*, viz. that on the event happening

(a) 8 Mees. & Wels. 194.

of *James Langham* becoming entitled to the possession of the family estates of Sir *James Langham*, not only was the use and estate limited to him to cease and determine, but also the uses and estates limited to his issue male, i. e. to his first and other sons. So that there no longer remained any contingent remainders which required to be preserved by the estate limited to the trustees to preserve contingent remainders, and the estate was to go over in the same manner as if he were actually dead without issue male. And therefore, as in *Carr v. Lord Erroll*, it was decided that the estate went, not to the trustees to preserve contingent remainders, because there were no contingent remainders to preserve, but to *Langham Christie*, the person who would have been next entitled if *James Langham* had actually died without issue male.

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It now remains to consider the case of *Morrice v. Langham* (a), which was the case upon the will of *Francis Tutte*, dated 24 June, 1820.—[His Honor stated the facts.]

The testator died 13th January, 1824. On the 14th of April, 1833, *James Hay Langham* became entitled in possession to the settled estates of Sir *James Langham*. *James Hay Langham* had then no son born. *Edward Ayshford Landford* was the heir of *Herbert Hay*. The heir of *Herbert Hay* contended that as the life estate of *James Hay Langham* had ceased and determined, and there was no son of *James Hay Langham* to take the estate, he (the heir of *Herbert Hay*) was entitled to the estate as the person next in remainder under the limitations. That contention was precisely the same as that which is now raised by Mrs.

(a) 11 Sim. 260.

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Lambarde; for she contends that as the life estate of *Edmund Henry Turton* has ceased and determined, and there is no second son of *Edmund Henry Turton* to take the estates, she is entitled as the person next in remainder under the limitations. The Court decided against the claim of the heir of *Herbert Hay*. With reference to that claim, the Vice-Chancellor says (p. 279) "It appears to me that it is quite impossible" &c. to "any interest to the right heirs of *Herbert Hay*." The Vice-Chancellor does not here expressly refer to the estate limited to the trustees during the life of the tenant for life in trust to preserve contingent remainders, because the whole legal fee being in the devisees in trust, that estate, according to *Hopkins v. Hopkins*, was of itself sufficient to support all the contingent remainders, even if there had not been an estate limited to trustees during the life of the tenant for life in trust to preserve contingent remainders.

The Court having decided against the claim of the heir of *Herbert Hay*, the next question was, who was entitled to the rents and profits from the time when *James Hay Langham* became possessed of the settled estates of Sir *James Hay Langham* until he should have a son to take the estate. *James Hay Langham* could not have them, because his estate and interest had ceased and determined by the express direction of the testator. The specific disposition of them having failed, the rents of the *freeholds* were held to go as in default of appointment, and to belong to the person who might be entitled under the deed of 1804, which created the power, and for that reason the Vice-Chancellor directed the case to be sent to the Court of Exchequer upon the question under that deed. As to the rents of the copyhold, which were not included in the deed, and there-

fore not appointed but devised, it was held that they belonged to the residuary devisee. Accordingly by the decree it was declared.—[His Honor referred to p. 280 of the Report.]

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On appeal to the House of Lords (a) the decree was affirmed as to the *copyholds*, but it was reversed as to the *freeholds*, not on the merits, but merely on the ground that it was an attempt to decide a question between co-defendants.

These authorities appear to me to be sufficient to establish these propositions :—

1. That in cases of this nature the Court will endeavour to effectuate the testator's intention that the estate should go to the unborn sons of the tenant for life whose estate has ceased and determined, as well as his intention that the two estates should not vest in the same person.

2. That for this end the Court will struggle with, and if possible get over particular expressions which seem to stand in the way of that object.

3. That if there be contingent remainders to the unborn sons of the tenant for life whose life estate has ceased and determined, which require to be supported by the estate limited to trustees to preserve contingent remainders, those trustees shall, if possible, be held to take the estate as the persons next in remainder for the purpose of supporting the contingent remainders, and not the remainderman to whom the estate is limited after

(a) *Sanford v. Morrice*, 11 Clarke & Fin. 667.


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the expiration or failure of the estates limited to the unborn sons of the tenant for life.

4. That the intermediate rents accruing between the time when the estate of the tenant for life ceased and the birth of his son entitled under the limitations shall belong to the residuary devisee, if there be a residuary devisee, and if not, then to testator's heir-at-law.

Mrs. *Lambarde's* bill must be dismissed.

Feb. 21.

*Ecclenastical
 Benefice.
 Statutes.
 Rectory.*

BOYD v. BARKER.

THE 17 Geo. 3, cap. 53, enables the incumbent of a living, with the consent of the bishop and patron, to add to as well as to repair or rebuild a rectory house, and necessary or sufficient repairs under that Act means such repairs or additions as the bishop thinks fit for making the rectory a fit and comfortable habitation for a clergyman.

THIS was a bill by the Rector of *Wouldham* in *Kent*, to impeach the validity of a charge on the living made by his predecessor under the 17 Geo. 3, c. 53, *Gilbert's* Act, for expenses incurred in adding to the rectory house.

The preceding rector, the Rev. Mr. *Barker*, entered upon the living in 1834, and held it for about twenty years. When he so entered upon it the rectory house was in a very unsatisfactory state, consisting of only a kitchen and back kitchen, and some cellars and bed rooms; there was no sitting room, properly so called, at all, and Mr. *Barker* then built at his own expense a sitting room, and so occupied the house for about ten years. At the end of that period he took the regular course under the Act for enabling him to improve the rectory house, with the sanction of the bishop, who was also the patron, and to charge the living with the

expense ; and it was charged with 300*l.*, the actual expense incurred being considerably more, and the balance being paid by Mr. *Barker* out of his own resources. Mr. *Barker* himself advanced the 300*l.*, so that he became the mortgagee under the Act. The money was expended in adding to the house an additional sitting room, a butler's pantry and a few bed rooms. The Plaintiff now impugned the validity of the remaining incumbrance on the living (70*l.* having been paid off) on two grounds :—1st. That the Act did not authorize any *addition* to the rectory house. 2ndly. That if it did, it only authorized necessary additions, and the additions made were not necessary.

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Mr. *Greene* and Mr. *W. Morris*, for the Plaintiff.

1st. The Act contemplates building where there is no house, or repairing where it is dilapidated, but not addition. There is no word in the Act capable of that interpretation. If it were so construed, what is the limit to addition ?

2nd. These additions were not necessary. Mr. *Barker* had occupied the house for ten years in its preceding state, why should he afterwards require more, and throw the charge of it on his successors ?

They cited *Groves v. Hugell* (a), and *Greenlaw v. King* (b).

Mr. *Glasse* and Mr. *Pole*, for the Defendant, were not heard.

The VICE-CHANCELLOR : The state of circumstances is this. When Mr. *Barker* was rector, the rectory

(a) 3 Russ. 428.

(b) 3 Beav. 49.

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~
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house was of the following character.—[His Honor described it as above in the statement of facts.] Now, no doubt, in times happily now long gone by, a clergyman might have been expected to be contented with such a residence. But things have much changed since then, and a clergyman is now expected to occupy the position of a gentleman, and requires a residence that should at least possess the decent comforts of a gentleman's house. Mr. *Barker*, it appears, was not satisfied, and reasonably not satisfied, with this state of his residence, and built at his own expense a single additional room as a sitting-room, and so he continued to occupy the house for about ten years. He afterwards considered it desirable to have a second sitting-room and another room as a butler's pantry or some sort of servant's room, and over these of course some additional bed-rooms. These were to cost about 500*l.*, and 300*l.* only was proposed to be charged under the Act upon the living, and was so charged with the consent of the bishop and patron. Of this charge 70*l.* have been paid off, and Mr. *Boyd* has filed this bill to be relieved from the remaining charge, impugning the transaction as illegal, and, if not illegal, unnecessary.

The ground which he takes is this: he says that what was done was not sanctioned by the Act; that this is a case of *adding* to the rectory, and that is not within the Act; and that is really the only question of importance in the case. The argument goes to this extent, that even when rebuilding a house you have no right to rebuild it one foot larger in any direction than it was before. [The VICE-CHANCELLOR then referred to the words of the Statute.]

It is contended that under this language there is no

power to *add* to the building under any circumstances. If that were the construction it would entirely defeat the intention of the Act. [His Honor referred to the preamble, in which the expressions are, in reference to a living “whereon there is *no house* of habitation, or such house is become *so ruinous and decayed*, or is so mean that one year’s net income and produce of such living will not be sufficient to *build, rebuild or put the same with the necessary offices belonging thereto in sufficient repair.*”] The purpose of the Act is, to hold out inducement to clergymen to reside, in order that the parishioners may have the benefit of their instruction and of their hospitalities. It is true that, since that, several Acts have been passed which have made it more necessary to reside, and may render the objects of this Act less important ; but that does not alter the fact that such is the purpose of this Act. Now the argument is, that, let the habitation be what it may, you cannot, whether rebuilding or merely wishing to add to it, you cannot make any addition under this Act,—you cannot hold out that inducement to clergymen to reside, which the Act says is its very object.

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Is that, however, even the fair construction of the very words of the Act ?

Suppose there is no existing habitation : it is admitted you may build to the extent that the bishop thinks right. If you find the habitation in a miserable condition, then you may repair it ; or if it is so decayed as to be uninhabitable, you may pull it down and build a new one.

Again, when there is a building, but it is so ruinous that one year’s income will not repair it, then you may rebuild. Lastly, when the house is so “mean that” &c.

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[His Honor quoted the words of the preamble above referred to.] Now what does that word mean? It is argued that it does not refer to the misery of the place itself, but to the nature of its structure; that if it is made of lath and plaster you are within the meaning of the clause, but not if it is of brick, however mean the house may be.

It appears to me that that is not the meaning of the Act; the object of the Act is, as I have said, to induce clergymen to reside, and I think it does, if in the opinion of the bishop it is not a fit and comfortable habitation, authorize such additions as will make it so. That, I think, is the construction of the Act.

[His Honor then went into the question whether the additions made were necessary, and held that they were so having regard to the intention of the Act and the position of a clergyman at this day.]

Bill dismissed with costs.

1859:
May 5.

*Resulting Trust.
Construction.
Incorporeal
Hereditaments.
Special
Occupancy.*

NORTHEN v. CARNEGIE.

IN this case the questions turned on the effect of a voluntary settlement made by Mr. *Vernon Cotton*.

That settlement was made between *Vernon Cotton* of the first part, the Plaintiff *Northen* and his wife *Mary Anne* and *Elizabeth Cotton* and *Harriet Cotton* of the second part, and *Harris* and *Cotton*, trustees, of the third part. Mrs. *Northen* and *Elizabeth* and *Harriet Cotton* were the settlor's only children.

The settlement recited a lease by the Bishop of *Lichfield* to *Vernon Cotton*, by which the prebend of *Eccleshall* and the rectory of *Eccleshall*, and certain other property appurtenant to the prebend, were granted to *Vernon Cotton*, *his heirs and assigns*, for three lives, viz., the lives of his three daughters, *Mary Anne*, *Elizabeth* and *Harriet*. The conveyance to the trustees was: to them, their *executors, administrators* and *assigns*.

The uses of the settlement were as *V. Cotton* should appoint, subject thereto to the use of *V. Cotton* for life, remainder on trust that the trustees should pay the rents and profits as to the one-third thereof to the Plaintiff *Northen* and his wife for their lives, and the life of the survivor, remainder absolutely to the younger children or only child of Mrs. *Northen* living at his death; as to another third, for *Elizabeth Cotton* for life, remainder absolutely to his younger children or

I. Limitation of an incorporeal hereditament to *A.*, *his heirs* and *assigns*, for lives. *A.* conveys it to trustees, their executors, and administrators, upon contingencies which never happened. Held, that he had parted with his whole estate *at law*; but with a resulting beneficial interest in him in so much as he had limited on the contingencies.

II. The word "survivors" held on the context to mean strictly "survivors" and not "others."

III. Semble, that an executor may be special occupant of an incorporeal hereditament.

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only child living at his death; and as to the remainder one-third, on the same trusts with reference to *Harriet Cotton* and her younger children or only child.

Then followed this proviso:—"In case any one or more of them the said *Francis Northen* and *Mary Anne* his wife, *Elizabeth Cotton* and *Harriet Cotton* shall happen to die without leaving children or a child as aforesaid, then the part or share or proportion of her or them so dying shall go and be paid as aforesaid in equal shares to the survivors or survivor of them, in such manner as the parts or shares or part or share of the parents or parent are or is directed to be paid, assigned and transferred."

Mr. V. Cotton, the settlor, died in 1817. His three daughters survived him, and were his co-heiresses. *Mary Ann Northen* had no son, but four daughters. *Harriet Cotton* married *Mr. Bagshawe*; she had no son by that marriage, but two daughters, *Harriet* and *Rose*; she afterwards married *Mr. Belcombe*, and had by that marriage a son and several daughters. *Rose Bagshawe* died, making the Defendant *Carnegie* her residuary devisee and legatee, and he claimed all her interest under the settlement. *Elizabeth* married *Mr. Taylor* and died in 1853, never having had any children.

In 1858 the lease was sold to the Ecclesiastical Commissioners for 16,000*l.*, and that sum in the hands of trustees was the subject matter of the claims in the suit. *Mary Anne Northen* had died in 1841, and *Harriet Cotton* in 1849; so that they and their children could take no interest under the proviso in the nature of a limitation of cross remainders in the share of *Elizabeth*,

unless the word "survivors" was to be construed "others."

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The point most argued was, whether the conveyance being to the trustees, their *executors and administrators*, the share of *Elizabeth* would pass as real or as personal estate; and that question involved the discussion whether executors can take incorporeal hereditaments limited *pur autre vie* at all as special occupants.

Mr. *Baily* and Mr. *Hobhouse* appeared for the Plaintiff.

Mr. *Glasse* and Mr. *F. T. White* for the Defendant *Carnegie*, who claimed the interest of *Rose*, the daughter of *Harriet*, in *Elizabeth's* share as *personalty*.

Mr. *Shapter* and Mr. *Bury* for Mr. *Belcombe*, the son of *Harriet* by her second marriage, who claimed, both as a younger child and as heir at law of *Harriet*, to be interested in *Elizabeth's* share, and contended that it was *real estate*.

Mr. *Bagshawe*, Mr. *Brodrick* and Mr. *Jervis* for other parties.

[*Doe v. Prigg* (a); *Jarm. Wills* (b); *Commissioners of Charitable Donations and Bequests v. Cotter* (c); *Rose v. Hill* (d); *Maberly v. Strode* (e); *Edwards v. Simons* (f); *Coke, Litt.* (g); *Rolle's Abr.* (h); *Cruise's Dig.* (i); *Brown v. Jones* (k), were referred to.]

(a) 8 B. & Cr. 231.

(b) Page 615 (2nd edit.)

(c) 1 Dru. & W. 498.

(d) 3 Burr. 1881.

(e) 3 Ves. 450.

(f) 6 Taunt. 213.

(g) Page 388a.

(h) Page 151.

(i) Page 112.

(k) 1 Atk. 188.

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Judgment.

The VICE-CHANCELLOR.


This case is, undoubtedly, somewhat out of the ordinary routine, and raises questions which do not often come before the Court.


The facts are simple enough. Mr. *V. Cotton* had three daughters; and on the 4th of February, 1812, he executed a voluntary settlement, for the purpose of settling on his daughters certain property of a peculiar character, viz., prebendal property, held under a grant from the Bishop of *Lichfield*.—[His Honor then referred to the settlement and facts stated in pp. 587, 588, and proceeded:]—That was the property which Mr. *Cotton* settled. The property being granted to him, *his heirs and assigns*, the first question is, what was his interest? Supposing he had died, leaving the *cestuis que vie* living, to whom would the property have gone, if this settlement had not been made?

The general doctrine as to estates *pur autre vie* is plain enough. As to lands, if there is a lease to *A.* during the life of *B.*, and *A.* dies living *B.*, any person (at common law) who got possession of the land might hold it during the remainder of *B.*'s life as general occupant. But if the lease is to *A.* and *his heirs* during the life of *B.*, then general occupancy is not permitted, and upon the death of *A.* the heir of *A.* would take. Now an heir, strictly speaking, can take by *descent* only an estate of *inheritance*, and it is, therefore, inaccurate to speak (though the expression is frequently used) of a descendible freehold not of inheritance. The heir in the case put takes not by *descent*; it is true he takes it because he fills the character of heir; but he takes not as heir by *descent*, but as *special occupant*.

Then comes another question. Suppose a lease of land *pur autre vie* to *A.*, his *executors and administrators*. Then, this question has been raised. *A.* dies leaving the *cestuis que vie* living; does *A.*'s *executor* take as special occupant, or may anybody take as general occupant? Upon this point there are authorities on both sides. One ground on which it has been contended that the executor cannot take is, that an executor takes only personal, not real estate. But I think that argument is founded on a misconception. When land is granted to *A.* and his executors, the executor does not take *as executor* by *descent* or devolution from his testator, but as the person described as *special occupant*. Another reason given is, that if there is a limitation to *A.* and his executors during the life of *B.*, and *A.* dies living *B.*, there must be some interval before the title of the executor accrues, and that neither the executor nor administrator can take instantly. But I cannot see the force of that reasoning. If a man *devises* land to his executors, some interval must elapse before there is an executor completely constituted; but has it ever been held that such a devise cannot take effect? or has its validity been ever even doubted? However, that question is not necessary for me to decide here; but if it were, I should certainly hold that it is competent to an executor to take *land* as special occupant.

Then another question has arisen, when the property is incorporeal, such as rent, tithes, &c., in that case can there be a special occupant? And there are *dicta* which tend to the conclusion that in such a case there cannot be a special occupant. But the effect of the authorities on the whole is in my opinion clearly this: that although as to incorporeal hereditaments there cannot be a general occupant, there is nothing to prevent special

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occupancy. There is no reason against it; and it seems unnecessary for any purpose of reasoning or principle to hold otherwise. And when you consider the reasoning on which it has been said that there can be no occupant, it is clear that that reasoning applies to *general*, not to *special* occupancy. The reason assigned is this. The occupant in his defence to a real action must either allege right in himself through his ancestor, which a general occupant of course cannot do; or else he must plead a *que estate*, that is, the estate of the person whose estate he has; and to show that, he must show the deed under which he claims, which the general occupant who has no documents of course cannot do. That is the sort of technical reasoning that has been applied. But it is clear that reasoning does not apply to a *special occupant*. He cannot plead it is true that he is in of his ancestor's estate, but he can plead in the *que estate*; he can plead his deed, and therefore if it were necessary to decide it, there would be no doubt on my mind that there may be a *special occupant* of an *incorporeal hereditament*. And concluding as I do that the law is that an executor may be special occupant of a *corporeal* hereditament, I should have no hesitation in coming to the conclusion that he may also be special occupant of an *incorporeal* hereditament.

But in this case, it is of little importance whether an executor or administrator can be a special occupant or not. In this case the limitation was to *V. Cotton* his *heirs and assigns*; and he conveyed to trustees their *executors and administrators*. He parted by that conveyance with his whole interest at law; and the effect is that the executors of the trustees would be the special occupants at law. Then, the remaining question is, what is the effect of the gift of the beneficial estate?

The limitation is—[His Honor referred to the limitation over set out in pp. 587, 588, and proceeded :]—If there were no children of either daughter, what was the effect? Why, so far as Mr. *Vernon* had not parted with the beneficial interest, it remained in him as a resulting trust. It was not a new estate, but merely so much *remaining* in him as he had not parted with. The estates to the children were contingent until the birth of children, and the contingency on which he had parted with the interests limited to *Elizabeth's* children not having arisen, so much estate remained in him.—[His Honor referred to *Lomas v. Wright (a)*.]—In this case therefore, though Mr. *Cotton* parted with the whole *legal* interest, yet so much of the *beneficial* interest as he has not parted with remains *his* estate.

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It is said however that the one-third share of *Elizabeth* who died in 1853 having had no issue was parted with under the limitations, because it is argued that it goes to the "survivors," and that brings me to the question what is meant here by "survivor."

His Honor then referred minutely to the language of the settlement, and held that the word "survivor" must be construed strictly as "survivor," and not as "other;" and therefore, that *Elizabeth's* share was undisposed of, and, remaining in the settlor as *his estate*, descended to his three co-heiresses.

(a) 2 Myl. & K. 769.

1859:
June 4th.

Power.
Appointment.
Fraud.

In re MARSDEN'S TRUST.

Where the donee exercises a power of appointment in favor of one of several objects of the power, with a view to the benefit of a stranger, the appointment is fraudulent and void, even although the appointee is ignorant of the fraud, and the motive of the donee is not morally wrong.

Therefore, where a married woman having a power to appoint a fund, of which she received the income for her life, among her children, appointed the whole fund at her death to her eldest daughter, in order that thereout the daughters should benefit her

father, but the daughter was not informed of the mother's intention until after her mother's death:

Held, that such appointment was void.

THIS was the petition of *Isabel Charlotte Martin*, praying the transfer out of Court to her of certain canal shares; and the question was, whether the appointment, under which she claimed to be admitted to the shares, was or was not, under the circumstances, a fraudulent execution of a power of appointment contained in a certain indenture of settlement of the 14th of October, 1836, and consequently void.

By that indenture, which was executed in contemplation of the marriage of *Charlotte Marsden* with *William John Martin*, the canal shares in question were vested in trustees upon trust to pay the annual income of the shares to Mrs. *Martin*, for her sole and separate use for her life, and after her decease the shares were limited as to one-fourth part of the income to any husband she might leave surviving, for his life, and subject thereto the trustees were directed to stand possessed of the said canal shares in trust "for all and every or such one or more exclusively of the others or other of the children or child or other issue of the said *Charlotte Marsden*, with such provisions for the respective maintenance, education and advancement, at such age, day or time or respective ages, days or times, and if more than one, in such parts, shares and proportions, and charged with such annual sums of money and limita-

tions over for the benefit of the said children and issue or some or one of them, and upon such conditions and with such restrictions and in such manner as the said *Charlotte Marsden*, whether covert or sole, and if under coverture notwithstanding such coverture, should by any deed or deeds, instrument or instruments to be by her sealed or delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils in writing, or any writing in the nature of or purporting to be a will or codicil, to be by her signed and published in the presence of and attested by the like number of credible witnesses, from time to time direct or appoint, and in default of such direction or appointment, and so far as any such direction or appointment if incomplete or partial should not extend, in trust for all and every the children or child of the said *Charlotte Marsden*, who being a son should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry under that age with the consent of her or their parent or parents, guardian or guardians for the time being, and to be divided between or amongst the said children, if more than one, in equal shares as tenants in common."

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Mr. and Mrs. *Martin* were married on the 22nd of November, 1836, and there were five surviving children of the marriage, of whom the present Petitioner, *Isabel Charlotte Martin*, was the eldest.

It appeared that Mrs. *Martin* wishing to make a better provision for Mr. *Martin* than was contained in their marriage settlement, in case of his surviving her, it was proposed that she should make her will in exercise of the power of appointment contained in the

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indenture of the 14th of October, 1836, and should leave the whole property to her eldest daughter, *Isabel Charlotte Martin*, on condition that she should on attaining her majority make over to her father one-half of the property, and give him a life-interest in the other half. Having been advised that this arrangement could not be carried out, Mrs. *Martin* on the 24th of July, 1857, executed a deed poll, appointing the canal shares to her eldest daughter, *Isabel Charlotte Martin*, absolutely.

It appeared that the intention of Mr. and Mrs. *Martin* was, that Mr. *Martin* should, after the death of Mrs. *Martin*, inform the daughter of the object to effect which the appointment had been exercised in her favor, leaving it in the discretion of the daughter to carry out her mother's intentions.

It was admitted that *Isabel Charlotte Martin* was entirely ignorant of the execution of the appointment in her favor till after the death of Mrs. *Martin*.

Mrs. *Martin* died in August, 1858, and *Isabel Charlotte Martin* having attained the age of twenty-one on the 20th of November, 1858, applied to the trustees under the indenture of the 14th of October, 1836, to transfer to her the canal shares, to which she claimed to be entitled under the deed poll of the 27th of October, 1836. Questions having been raised on the part of the younger children as to the validity of the appointment, the trustees paid the fund representing the canal shares into Court, and *Isabel Charlotte Martin* presented the present petition for the payment of that fund out of Court to her.

Mr. *Shapter* and Mr. *Renshaw* in support of the petition.

The appointment in favor of the Petitioner is a good exercise of the power, and is not void as a fraudulent appointment. *Mrs. Martin* had a discretion given her by the power to exercise it in favor of any of the children to the exclusion of the others, and she has accordingly appointed in favor of the eldest daughter. There has been no bargain between the appointor and the appointee, for it is admitted that the daughter did not even know of the appointment in her favor till after the death of her mother; and whatever may have been the intention of *Mrs. Martin* in making the appointment, the daughter is not even *morally* bound to carry out such intention, neither is the appointment in her favor vitiated thereby. No fraudulent intention on the part of the appointor in exercising her power has been proved, and the Court will not interfere with the exercise of the discretion given to the donee of the power, unless such a fraudulent intention has been actually proved. No presumption, however strong, is sufficient.

Mr. Baily and *Mr. Cracknall* for the younger children.

The appointment in favor of the eldest child is under the circumstances a fraud on the power. It is not necessary, in order to render an appointment fraudulent and void, that there should have been a bargain between the appointor and appointee. *Huguenin v. Baseley* (a) is an authority that interests obtained through the fraud of another person cannot be maintained; and Lord *St. Leonards*, in the case of *Keily v. Keily* (b), states it broadly that "there can be no doubt that this Court

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(a) 14 Ves. 289.

(b) 4 Dr. & W. 38—56.

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has full power to restrain any undue, I mean any fraudulent, execution of the power." The fraudulent intention on the part of Mrs. *Martin* in making this appointment to benefit Mr. *Martin*, who is not an object of the power, has been clearly proved; the Court, therefore, will interfere, and will not permit this appointment to stand.

Mr. *Shapter* in reply.

The following authorities were cited in the course of the argument:—*Fearon v. Debrisay* (a); *M^r Queen v. Farquhar* (b); *Beere v. Hoffmister* (c); *Wellesley v. Mornington* (d); *Daubeny v. Cockburn* (e); *Birley v. Birley* (f); *Watt v. Creyke* (g); *Butcher v. Jackson* (h); *Carver v. Bowles* (i); *Lane v. Page* (k); *Wright v. Goff* (l); *Campbell v. Home* (m); *Askham v. Barker* (n); *Wheate v. Hall* (o); *Vane v. Lord Dungannon* (p); *Lysaght v. Royse* (q); *Rowley v. Rowley* (r); *Re Beloved Wilke's Charity* (s); *Aleyn v. Belchier* (t); *Lee v. Fernie* (u).

THE VICE-CHANCELLOR.

The question raised by this petition is, whether a certain execution of a power of appointment is to be considered as valid, or whether it is void as being a fraud on the power. The Petitioner is the person in whose

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| (a) 14 Beav. 635. | (l) 22 Beav. 207. |
| (b) 11 Ves. 467. | (m) 1 Y. & C. C. 664. |
| (c) 23 Beav. 101. | (n) 12 Beav. 508. |
| (d) 2 Kay & John. 143. | (o) 17 Ves. 80. |
| (e) 1 Mer. 640. | (p) 2 Sch. & Lef. 118. |
| (f) 25 Beav. 299. | (q) <i>Ibid.</i> 151. |
| (g) 3 Sm. & Giff. 362. | (r) Kay, 242—262. |
| (h) 14 Sim. 444. | (s) 3 Mac. & Gor. 440. |
| (i) 2 Russ. & My. 301. | (t) 1 Eden. 132. |
| (k) Ambl. 233. | (u) 1 Beav. 483. |

favor the power has been exercised, and she insists that the appointment is valid, and under the circumstances not a fraud on the power.—[His Honor having stated the facts of the case above set out, proceeded :]—On the face of the instrument the power appears to have been well exercised, and the question is, whether under the circumstances it is in effect a fraud on the power.

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The power in question is only one form of a discretionary trust to be exercised for the benefit of certain objects, or some of them. The objects of the power are the children of the marriage; and the purpose of the settlement was to make a provision for their benefit, but at the same time to reserve to the mother such a power as would keep the children under her control, and to enable her to distribute the property among them in such manner as in her opinion their respective wants and interests and the exigencies of the case might require. The same general principles which are applicable to discretionary trusts in general are applicable to this particular species of discretionary trust. Unless it can be shown that the trustee having the discretion exercises the trust corruptly or improperly, or in a manner which is for the purpose not of carrying into effect the trust but defeating the purpose of the trust, the Court will not control or interfere with the exercise of the discretion. There may be a suspicion that the trust has been exercised in a particular manner and from a certain motive, which, if it could be proved, would be held not to be a proper motive; but if it be mere suspicion—though suspicion is ground for jealous investigation—if it be mere suspicion, and not matter amounting to a judicial inference or conviction from the facts, the Court will not act upon it. But if on the other hand it can be proved to the satisfaction of the judicial mind that the

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power has been exercised corruptly or for a purpose which defeats instead of carrying into effect the purpose of the trust, then the Court will not permit such an exercise of the power to prevail.

What then are the circumstances in the present case? It is clear that for a period of two years before the instrument in question was executed Mr. and Mrs. *Martin* had discussed the settlement, and Mrs. *Martin* seems to have considered that it excluded her husband from that degree of interest in the property which it is customary to give him, and which she thought it reasonable that he should have; she regretted that the property had been so settled, and she desired to provide for him if possible a larger interest than the settlement gave him. With this view it was suggested that an appointment might be made in favor of the eldest daughter absolutely, with a condition on the face of it that she should after the death of her mother give Mr. *Martin* the benefit intended. That idea was abandoned only because they were informed that an appointment with such a condition on the face of it would be invalid; and then it was determined to effectuate the desired object by making an appointment in favor of the daughter, unconditional on the face of it, but under an arrangement between Mr. and Mrs. *Martin*, that on Mrs. *Martin's* death the daughter should be informed by her father of the intention with which the appointment was made, and so be induced to carry out that intention. So that this appointment clearly was intended to defeat the purpose of the power.

Now it appears to me, that looking to the authorities and in the view I have taken of the evidence, the case comes within that class of cases in which this Court

says there has been a fraud upon the power, inasmuch as it has been exercised in such a way as to defeat the purpose for which it was given.

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In some of the cases which have been cited, there has been a direct bargain between the donee of the power and the person in whose favor it is exercised, under which the donee of the power was himself to derive a benefit; and certainly there has been nothing of that kind in this case. In my opinion, however, it is not necessary that the appointee should be privy to the transaction, because the design to defeat the purpose for which the power was created will stand just the same, whether the appointee was aware of it or not; and the case of *Wellesley v. Mornington* (a) shows that it is not necessary, in order to bring the case within the scope of the jurisdiction on which this Court acts, that the appointee should be aware of the intentions of the appointment, or of its being actually made.

Neither is it necessary that the object should be the personal benefit of the donee of the power. If the design of the donee in exercising the power is to confer a benefit, not upon himself actually, but upon some other person not being an object of the power, that motive just as much interferes with and defeats the purpose for which the trust was created, as if it had been for the personal benefit of the donee himself. I must hold that this exercise of the power is void as being what is technically called a fraud on the power; and I cannot grant the prayer of this petition, which must be dismissed with costs.

(a) 2 Kay & J. 143.

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June 11.

*Mortgagees'
Suit.*

*Costs of
Defendant
Infant*

*Heir-at-law of
Mortgagor.*

Where an equitable mortgagee by deposit institutes a suit merely to realize his security, and not for the administration of the general estate of the deceased mortgagor; and a sale of the mortgaged property having been directed, the proceeds of the sale prove insufficient to satisfy both; the mortgagee is entitled to the payment of his debt, interest and costs before the payment of the costs of the Defendant infant heir of the mortgagor.

WADE v. WARD.

THE question in this case was, whether the Defendant, the infant heir-at-law of a mortgagor, who had been made a Defendant to a claim by an equitable mortgagee by deposit, was entitled to be paid his costs incurred in the suit in priority to the payment of the mortgage debt and costs due to the Plaintiff; the proceeds of the mortgaged property which had been sold being insufficient to pay the mortgagee's debt and costs in full.

The Plaintiff filed a claim against the infant heir-at-law of the deceased mortgagor for a sale of the mortgaged property.

By a decree made on the claim in April, 1857, the mortgaged property was ordered to be sold, and the property was accordingly sold and the proceeds of the sale paid into Court.

The proceeds of the sale of the property were admitted to be insufficient to pay the Plaintiff's debt and costs, and also the costs of the Defendant, the infant heir-at-law of the mortgagor.

Mr. *Smythe* for the Defendant, the infant heir-at-law of the mortgagor.

The Defendant is entitled to be paid his costs out of the proceeds of the sale of the mortgaged property. He is merely the infant heir of a deceased mortgagor, and has been brought here by the Plaintiff, solely for his own

in order to perfect the legal title to the mortgaged property, the Plaintiff being merely an equitable mortgagee by deposit. The Defendant may be considered a trustee for the Plaintiff, and as such is entitled to his costs. That is the principle in suits for administration, and this suit is in the nature of a suit for partial administration of the mortgagor's estate. That seems to have been the view taken by the Vice-Chancellor *Stuart* in the cases of *Backhouse v. Waters* (a), and *Macrae v. Ellerton* (b).

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Mr. *Eddis* for the mortgagee.

The mortgagee is entitled to be paid his debt and costs before the costs of the mortgagor's infant heir-at-law are paid. There is a clear distinction between a suit by a mortgagee to realize his security and a suit for the general administration of the mortgagor's estate. This distinction has been recognized by the Master of the Rolls in the cases of *Wild v. Lockhart* (c) and *Armstrong v. Storer* (d), although in the latter case all parties were allowed their costs, the suit having been instituted for general administration of the mortgagor's estate. The present suit cannot be considered in the light of an administration suit; all the mortgagee seeks is a realization of his particular security.

It would be inequitable that the infant heir-at-law of the mortgagor should have his costs before the debts and costs of the mortgagee have been satisfied. Had the suit been instituted against the mortgagor instead of against his heir-at-law, the mortgagor would not have been entitled to his costs, and there is no reason why

(a) Not reported: heard in sittings after Hil. Term, 1859.

(b) 4 Jur. N. S. 967.

(c) 10 Beav. 320.

(d) 14 Beav. 535.

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the mortgagor's heir-at-law, although an infant, should stand in a better position.

Mr. *Smythe* in reply.

The VICE-CHANCELLOR.

The distinction which exists between a suit to administer a mortgagor's general estate and a suit by a mortgagee to realise his particular security is quite obvious.

If a mortgagee is not satisfied with his security, and files his bill to enforce payment of his debt out of the general assets of the mortgagor, then the general assets being administered would primarily be available for the payment of the costs of the suit generally. But if a mortgagee, being satisfied with his security, does not desire to make himself a general creditor, and files his bill for foreclosure, then if a foreclosure be decreed he would have the estate absolute, and the Defendant heir, whether adult or infant, and also the executor in case of personalty, would have no costs. If the suit results in a sale, under the recent practice the sale being only substituted for a foreclosure, the same principle as to costs applies; and in the same way, where the mortgagee is an equitable mortgagee by deposit, he has a right to have his equitable mortgage converted into a legal mortgage.

Before the recent practice the Court was in the habit, where a bill was filed for foreclosure, of directing a sale of the property, where it would be for the benefit of all parties. Now suppose a bill had been filed by an equitable mortgagee against the mortgagor himself,

which resulted in a sale, what reason could there be for saying that the mortgagor should have his costs against his own property before the mortgagee's debt and costs had been paid? There would be no justice in such a contention, and it appears to me that neither the devisee nor the heir, who both claim under the mortgagor, and are equally bound with him to complete the title of the equitable mortgagee, can stand in any better position than the mortgagor stood; and therefore I do not see what right the devisee or heir of a mortgagor has to his costs in priority to payment of the mortgagee's debt and costs, where the suit seeks merely the realization of the mortgaged property, and not an administration of the mortgagor's general assets.

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It has been contended that in the present case the heir is an infant; but I do not see why an infant heir should be in a better position than an adult heir. If the sale takes place, as it generally does, and is for the benefit of the infant, I see no reason why he shall stand in a different position from that in which he would have stood had there been a foreclosure. It has been stated that the Vice-Chancellor *Stuart* expressed his opinion and decided in one case that an infant devisee or heir should have his costs, and that he seemed to consider that a suit of this kind might be regarded as a partial administration of the mortgagor's estate. But it does not appear to me that a suit of this nature is in any respect a partial administration of the mortgagor's estate. The balance belonging to the mortgagor is only what shall remain after payment of the mortgagee's debt and costs; and therefore I do not think I can follow the decision of the Vice-Chancellor *Stuart*.

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It appears to me that I must observe the broad distinction between a suit by a mortgagee for a general administration and a mortgagee's suit to enforce his rights only against his particular security, and hold that the infant heir of the mortgagee in the present case is not entitled to his costs of the suit.

July, 20, 21.

Power of
Leasing.

Surrender at
Option of Lessee.

EDWARDS v. MILLBANK.

THE trustees of a marriage settlement containing a power of leasing "for any term or number of years not exceeding twenty-one years," agreed to grant a lease of the mansion-house and grounds for a term of twenty-one years, determinable at the option of the lessee at the end of the first seven or four years of the term.

Held, that such a lease was within the power.

THIS was a special case for the opinion of the Court, whether the Plaintiff was entitled under an agreement of the 21st of April, 1859, to have a lease granted to him by the Defendants for a term of twenty-one years, subject to a power on the part of the Plaintiff to determine the lease at the end of the first seven or fourteen years of the term, upon giving to the lessors six months previous notice of his intention so to do.

By an indenture of settlement of the 20th of November, 1855, certain real estates in *Yorkshire*, of which a mansion-house, called *Fixby Hall*, and parcels of land formed part, were vested in three trustees upon trust (after certain trusts during the minority of the Defendant *Clara Clarke Thornhill*) that the Defendant *William Capel Clarke Thornhill* should receive, during the lives of himself and his wife, the Defendant *Clara Clarke Thornhill*, an annual rent-charge of 2,000*l.*, and subject thereto upon trust that the trustees should receive and pay the rents and profits of the premises to the Defendant *Clara Clarke Thornhill* for her separate use, with certain trusts over in favor of the first and other sons of the Defendants *William Capel Clarke*

Thornhill and Clara Clarke Thornhill his wife, successively in tail. In the same indenture was contained a power to the trustees, after *Clara Clarke Thornhill* should have attained the age of twenty-one years, "to demise or lease, or concur in demising or leasing, all or any part or parts of the hereditaments and premises hereinbefore expressed to be hereby granted and conveyed for any term or number of years not exceeding twenty-one years, to take effect in possession and not in reversion or by way of future interest, so that there shall be reserved on every such demise or lease the best or most improved yearly rent or rents, to be incident to the immediate reversion of the hereditaments so to be leased, that can or may be reasonably gotten for the same, without taking any fine, premium or foregift, or anything in the nature of a fine, premium or foregift for the making thereof, and so as there be contained in every such demise or lease a condition of re-entry for nonpayment of the rent thereby to be reserved in case the same shall be in arrear for the space of thirty days or upwards."

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For many years prior to 1844, the mansion-house called *Fixby Hall*, which had formerly been the residence of the *Thornhill* family, had become very dilapidated, and had been divided and let to three different tenants; but in the year 1844 the Plaintiff *J. P. Edwards* became tenant of the whole, and laid out considerable sums of money in restoring the mansion-house and buildings, and in 1855 a lease was granted to him of *Fixby Hall* and premises, and sanctioned by the Court of Chancery, for a term commensurate with the minority of the Defendant *Clara Clarke Thornhill*, then an infant. In this lease was contained a covenant on the part of the Plaintiff that he would, at the expiration

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of the term thereby granted, take a renewed lease of the premises for such a term, not exceeding twenty-one years, as the Defendant *Clara Clarke Thornhill*, or other the person entitled to the property, should require, with power to the Plaintiff to determine the term at the expiration of the first seven or fourteen years thereof, upon giving six months' notice.

On the 20th of May, 1857, the Defendant *Clara Clarke Thornhill* attained her age of twenty-one years, and thereupon the Plaintiff's lease expired.

The Plaintiff being desirous of continuing in the occupation of the mansion-house and premises, on the 21st of April, 1859, entered into an agreement with the trustees of the settlement of November, 1855, for a lease of the same for a term of twenty-one years from the 20th of May, 1859, determinable at the end of the first seven or fourteen years thereof by the lessee, on giving six months' previous notice. And it was provided that the agreement should be conditional on the Court of Chancery deciding that the trustees had power to grant such a lease under the terms of the leasing powers contained in the indenture of settlement.

The Defendant *Thomas Bryan Clarke Thornhill*, an infant, was the only issue of the marriage of the Defendants *William Capel Clarke Thornhill* and *Clara Clarke Thornhill*, and was the person entitled to the first estate of inheritance in the settled estates.

It was admitted that the lease proposed to be granted to the Plaintiff would be advantageous to the persons entitled to the estates, and the only question was as to whether the trustees could, under their power of leasing

contained in the settlement of the 20th of November, 1855, grant a lease for twenty-one years, determinable at the option of the lessee on the expiration of the first seven or fourteen years.

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Mr. Glasse and Mr. G. L. Russell for the Plaintiff.

A lease for twenty-one years, determinable at the end of the first seven or fourteen years at the option of the lessee, can be granted under the terms of this power. This property consists of a mansion-house and ornamental grounds, and is not building or farming property, and the same objections do not exist in this case to such a lease which existed in some of the cases in which it has been held that such a lease would be invalid. The power is to lease for any term or number of years not exceeding twenty-one, and does not require the lease to be for a term absolute.

In the lease granted to the Plaintiff, and which was sanctioned in chambers, power was given to the lessee to forfeit at the end of the first seven or fourteen years. Such a lease would be very beneficial to the tenant for life and those entitled to the inheritance; *Sugden on Powers* (a), and the cases there cited, and the written opinion of the Lord Chief Baron on the case of *Lord Musherry v. Chinnery and Others* (b).

Mr. Baily and Mr. Renshaw for the trustee, in the same interest as the Plaintiff.

Mr. Anderson and Mr. G. Osborne Morgan for the infant remainderman.

The trustees cannot under the power grant a lease

(a) Vol. 2, pp. 356, 362.

(b) *Sugd. on Powers*, vol. 2, App. No. 19, p. 620.

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with a clause of surrender at the option of the lessee. The effect of such a clause would be, that the lessee could hold his lease if he found it to his advantage, but if disadvantageous, might throw it up; and a lease with such a clause may be very disadvantageous to those entitled in remainder, although it may be for the benefit of the tenant for life. Lord *Manners*, in the case of *Lowe v. Swift* (a), expressed his opinion that to introduce such a clause would be a fraud on the power. There is a want of mutuality in such a lease. Mansion-house property is just as changeable in value as building or farm property, and the same objections apply to each equally. In *Jack v. Creed* (b), where the power was very similar to the present, a lease with a power to the lessee to surrender was held void.

Mr. *Glasse* was not called upon for a reply.

The VICE-CHANCELLOR.

I do not think I should have had much doubt as to the validity of a lease similar to that proposed to be granted in the present case, under the power contained in the settlement, had it not been for the difference of opinion expressed in those cases which have been decided in *Ireland* on this point. Some of the reasons of the judges, who think that such a lease is not within the power, seem to me to be reasons rather why it might be wise not to exercise the power, than reasons against the validity of such a lease. But the question is, whether the objections are so strong that I am bound to come to the conclusion that it could not have been intended that there should be power in any case to grant

(a) 2 Ball & Beat, 536. S. C., 2 Sugd. on Powers,
(b) 2 Huds. & Bro. 128; 357 (6th edit.)

such a lease. If, under any circumstances, the granting such a lease would be injurious to the persons entitled in remainder, that may be a reason for saying that we must construe the power so as to work out the obvious intentions of the parties, and hold that in such cases the power must not be so exercised.

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Suppose the power in the present case had been a power to demise or lease for *any* term of years. Would it be less a term because it is made determinable under certain circumstances? It has been held that it is not less a term because it is made determinable at the option of the lessor, and it has also been held that such a term is within the power, and there is no reason why a term determinable at the option of the lessor, or of the lessee, or of either of them, is not a term within the power; all that the power requires being that it should be a term for a number of years. Then suppose the power of leasing be limited, as in the present case, to a certain number of years. This is a limit beyond which the power cannot be exercised, but that limit does not affect the question as to the lease being a term; and it appears to me, considering the limitations of the power, that a term determinable at the option of both the lessor and lessee, or of either of them, is entirely within the terms of the power.

The main mischief which has been pointed out by the judges in Ireland, as arising from such an exercise of the power, is that, if the tenant finds it advantageous, he may exhaust the land, and then throw it up at the end of seven years. But the same objection would apply equally to a lease for seven or any other number of years certain.

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On the other hand the advantages of such a power appear to me to be very great. It is clearly for the benefit, both of the tenant for life and those entitled in remainder, that as good a rent should be obtained as possible, and many tenants would say, "I will give you a better rent if you will give me a lease determinable at the end of seven or fourteen years, than I will give you for a lease for twenty-one years absolutely, or for seven years only;" and it therefore appears to me that a great advantage would arise from construing the power in the way proposed, because in many cases a better tenant, and a better rent, would be obtained by such a construction.


With regard to the authorities which have been cited. There was only one case on the point decided in *England*. In *Jones v. Verney (a)*, Mr. Justice *Willes* expressed his opinion that such a lease would not be void under such a power. It is true that was a case of a building lease, but that did not affect the question; and that case is clearly an authority in favour of the construction contended for by the Plaintiff.

Then we come to the Irish cases. The first of these is *Lowe v. Swift (b)*. In that case Lord *Manners* expressed his opinion that such a lease would be a fraud on the power. Now, this is in effect holding that such a lease would be within the power, for how can that be a fraud on the power which is not within the power? The doctrine of fraudulent exercise of powers is a doctrine of the Court of Equity, and it is only when an execution of a power is within the power, that it is brought to a Court of Equity to set it aside as a fraudulent exercise of the power.

(a) *Willes*, 169.

(b) 2 Ball & Beat. 536.

In *Jack v. Creed* (a), the Court of King's Bench in *Ireland* held that such a lease is void, as not being within the power.

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In the case of *Sheehy v. Musherry* (b), the Lord Chancellor of Ireland expressed his great dissatisfaction at the decision in *Jack v. Creed*, and declared his opinion that such a lease was within the power; and although that case is not an absolute decision on this point, still it is to some extent an authority in favour of the Plaintiff's contention in the present case; and we have the opinion of Lord *St. Leonards* in favour of the validity of such a lease.

Had there been no other authorities on the point, my own opinion would have been in accordance with that of Lord *St. Leonards*.

In this state of the authorities, I have no hesitation in coming to the conclusion that the lease is within the power.

(a) 2 Huds. & Bro. 128. (b) 1 H. L. Cas. 576.

1859:
March 14, 15,
16.

*Solicitor.
Negligence.
Summary
Jurisdiction.*

DIXON v. WILKINSON.

Where *A. & Co.* are solicitors for a Plaintiff and also for the Receiver, and the Receiver remits to them money to be paid into Court in respect of his balances, which money they misapply, the Court has no power to compel them to repay the money on the petition of the Plaintiff.

Where solicitors have been guilty of even gross negligence in the conduct of a cause, the Court has no summary jurisdiction to give relief on petition.

THIS was a petition presented by a lady who had recently attained the age of twenty-one, seeking to make certain solicitors, who had conducted a suit in which she during her infancy was Plaintiff, liable for certain monies received by them, and for the loss which had been sustained by her by reason of the negligence and misconduct of those solicitors.

The Plaintiff, who was born in 1834, after the death of her father intestate, became, on the death of her mother, entitled to her mother's property by will, as well as to her distributive share of her father's property, and also to certain real estate of which her father was tenant in tail. In 1835 the bill was filed to administer the estates of the Plaintiff's father and mother. The Plaintiff's uncle, Mr. *Robert William Dixon*, was her next friend; Mr. *Rampling* was appointed Receiver; and *Samuel Dixon*, her grandfather, was appointed guardian. In July, 1840, a decree for the common accounts was pronounced, but no order was made as to the real estate.

Messrs. *Dean, Leeks* and *Dixon* were the Plaintiff's solicitors, and in 1846 the firm was changed by the retirement of Mr. *Dixon*, and the introduction of Mr. *Redpath*. The Master's report was made in 1843; and in 1849 the cause came to a hearing on further directions; and a decree for payment of debts, computing interest, and other consequential matters, was made. In May, 1849, a preliminary attendance before the Master

took place, since which no steps had been taken in the cause.

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The firm acted as solicitors for the Receiver as well as for the Plaintiff. Mr. *Dean* had received remittances from the Receiver for the purpose of paying his balances into Court, and had subsequently become bankrupt, without having paid the balances into Court. No payments had been made of debts, nor had any investment of dividends taken place; but costs incurred had been paid out of the rents of the real estate, for which purpose the cause had been brought on as a short cause. And, on the Plaintiff coming of age, instead of receiving anything, she found herself subjected to a claim for unsatisfied costs.

She now presented a petition, praying payment of the debts out of a small fund in Court; for an account of the monies paid to *Dean* by the Receiver, and that the firm, now consisting of *Leeks* and *Redpath*, might be held liable for such payments, and for negligence in the conduct of the suit. The remaining material facts will be collected from the judgment.

Mr. *Anderson* and Mr. *Rudall* were for the Petitioner.

They cited — v. *Jolland* (a); *Ex parte Bonbonus* (b); *Meggs v. Bians* (c); *Re Knight* (d); *Gruggen v. White* (e); *Re Rawrence* (f); *Floyd v. Nangle* (g); *Rez v. Tew* (h); *Mordecai v. Solomons* (i).

(a) 8 Ves. 72.

(b) Ibid. 543.

(c) 2 Ring. N. C. 625.

(d) 1 Bing. 91.

(e) 4 Taunt. 881.

(f) 3 Sm. & Gif. 367.

(g) 3 Atk. 568.

(h) Sayer, 59.

(i) Ibid. 172.

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Mr. *Glasse* and Mr. *H. Clarke* for *Leeks* and *Redpath*, the Respondents.

Whatever may be the merits; whatever relief the Plaintiff may be entitled to in a proceeding properly constituted, no relief can be given on petition. This is in effect a bill for a breach of trust and for an account, cloaked under an application for summary relief for misconduct. The claim is first against *Leeks* and *Redpath*, in respect of the money received by the firm from the Receiver. Now they were solicitors of the Receiver as well as of the Plaintiff; that is everyday practice. It may be right or it may be wrong, but in family suits it is usual. *Dean & Co.* received the payments from the Receiver as his solicitors. How, then, can the Plaintiff come against her solicitors to make them amenable for an act done by the Receiver's solicitors? No doubt, if Messrs. *Leeks* and *Redpath* have actually or constructively committed a breach of trust, they are *answerable*, but to whom?—to their client the Receiver, against whom it was committed, and he is not the complainant, so that if this were a bill, it would be wrong. Further, there is no instance of a petition to fix parties with a breach of trust; so that on that ground this petition is wrong also.

Then, as to the alleged misconduct; misconduct in an attorney is a question for damages, to be sought by an action. There is no summary jurisdiction, except in case of the very grossest negligence, even at law. And there is no instance of this Court exercising its summary jurisdiction to make a solicitor pay damages for negligence. *Frankland v. Lucas* (a) is directly contra.

They cited also *Luke v. Bridges* (b); *Chater v.*

(a) 4 Sim. 586.

(b) Prec. in Ch. 147.

Maclean (a). They objected, also, that Mr. J. H. *Dixson*, a partner in the firm, and the next friend, were not before the Court.

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Mr. *Anderson* in reply.

The attempt to distinguish Messrs. *Dean & Co.*, as solicitors for the Plaintiff, from the same firm as solicitors of the Receiver, is idle. The money belonged to the Plaintiff, and *Dean & Co.* had it; what does it matter in what character they had it? The moment it came into their hands, they were constructive trustees for the owner. Then it is said a petition will not lie. Suppose there had been a petition, assuming the merits to be with us, that the Respondents should show cause why they should not pay the money or be struck off the rolls? Can anyone doubt that, in that roundabout way, the Court would exercise jurisdiction? Then why not do that directly which it can do indirectly? If this petition cannot be sustained, what is the result?—That a party, where there is a suit; where there is misconduct and misapplication of money; and where the parties are, in the sense of being officers of the Court, on the record; is to be put to the expensive course of a suit, and to bring afresh before the Court, matter, the materials of which are already before it.

The VICE-CHANCELLOR.

This is a petition presented by a lady who has but recently attained the age of twenty-one, seeking to make certain solicitors, who conducted a suit in which she, during her infancy, was Plaintiff, liable for certain monies received by them, and also for the loss which has been sustained by her by reason of their negligence and misconduct.

(a) 3 Week. Rep. 261.

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It does not appear to me that anything which the Plaintiff has done since she attained the age of twenty-one has deprived her of any rights as against the Respondents, which she otherwise would have had; nor does it appear to me that I can attach any weight to the contention that we have not got Mr. *J. H. Dixon* and Mr. *R. W. Dixon*, the next friend of the Plaintiff, before the Court. Mr. *J. H. Dixon*, up to the year 1848, was a partner in the firm of *Dean, Leeks, Dixon and Redpath*, and although he may be accountable to the present Petitioner, it does not lie in the mouths of the other partners in the firm to complain that he is not here.—[His Honor then dealt with some minor points in the case and proceeded thus:—]

The first question is, whether the Court in the exercise of that summary jurisdiction which in many cases it will exercise over solicitors can, under the circumstances of this case, make Messrs. *Leeks* and *Redpath* liable for the monies which it is alleged, I think proved, were remitted to Mr. *Dixon*. Now, I have not the least doubt that when a solicitor, in his character of solicitor for a particular person, receives monies belonging to and for which he is accountable to the client, this Court will exercise a summary jurisdiction over the solicitor, and make him pay the money to the client without putting the client to the expense of an action or suit. But in order to justify the exercise of this summary jurisdiction, the money must have been received by the solicitor of the complaining party in that character; not in the character of solicitor to some other persons, but of solicitor to the party who invokes the jurisdiction. I must, therefore, consider in the present case how, and by whom, and to whom and in what character the monies were remitted.

In an early stage of the suit a Mr. *Rampling* had been appointed Receiver, and he for some time acted as such. The same solicitors, Messrs. *Dean & Co.*, acted for the Receiver, and also for the Plaintiff. It is a common practice for the same solicitors to act for both; and it is a practice in many cases attended with some advantage; but in many cases (as in the present) it has been most mischievous. It is the duty of the Plaintiff's solicitors to see that the Receiver duly and punctually pays in his balances; but if those solicitors are the solicitors for the Receiver also, they have an interest conflicting with their duty, as it is their interest not to press the Receiver, lest they should offend him, and he should be induced to employ another solicitor. Mr. *Rampling*, having for some time acted as Receiver, an arrangement was afterwards made, whereby, without formally displacing Mr. *Rampling*, but leaving him the ostensible Receiver, *R. W. Dixon*, the next friend of the infant, was to act as Receiver; an arrangement, which was attended with this advantage to the infant, that *Dixon* acted without salary. All the duties of the Receivership were to be performed, not by Mr. *Rampling*, but by *Dixon*; he was to collect the rents, and pass the accounts and pay in the balances. *Dixon* undertook to do so; he collected the rents as if he were actually the Receiver, and from time to time remitted money for the purpose of paying in the balances, *Dean & Co.* still acting as solicitors to the Receiver. The remittances were made by *Dixon* to Mr. *Dean*, who was one of the partners of the firm; and counsel have arranged that it shall be assumed by the Court as a fact that each of those remittances was made to *Dean* in bank notes, enclosed in a letter from *Dixon*, which also enclosed an account showing what

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the balance was in his hands; and that the money enclosed was the exact amount of that balance.

Such being the facts of the case, I am of opinion that these remittances must be considered to have been made by *Dixon* in the character of Receiver, or quasi Receiver, on account for the Receiver, and not in his character of next friend; and that they stand on the same footing as if *Dixon* had been formally appointed Receiver in the cause. I am further of opinion that the remittances were made to and received by *Dean* in his character of a partner in the firm, so that his receipts are to be considered the receipts of the firm, and so that each partner would be liable for them.

It is contended, indeed, that it is not in the ordinary course of a solicitor's business to receive monies from the client, and that, therefore, *Dean's* partners are not liable for his receipts. But it is every day's practice for the solicitors to a Receiver to have money remitted to them by the Receiver to pay in his balances, and to pay them in accordingly. And I am of opinion that *Dean's* receipts for that purpose must be regarded as the receipts of the firm. But the firm of *Dean & Co.* were the solicitors to the Receiver and also solicitors to the Plaintiff. In which, then, of those two characters was the money remitted to and received by them? To answer this question it is only necessary to consider how it would have been if different persons had been solicitors for the Receiver and for the Plaintiff: to which of the two, in that case, would the Receiver have remitted his balances for the purpose of their being paid into Court? Clearly to his own solicitor, and not to the solicitor of the Plaintiff. It is not the function of

the Plaintiff's solicitor, as such, to receive and pay into Court the Receiver's balances. I am, therefore, of opinion that the monies in question must be considered as having been received by *Dean & Co.* in their character of solicitors to the Receiver, and not in the character of solicitors to the Plaintiff.

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If, then, the monies were remitted by *Dixon*, as Receiver to *Dean & Co.* as his solicitors in that character, can I, in the exercise of a summary jurisdiction, on the application, not of the Receiver, but of another person who happens to have employed the same solicitors, make such solicitors liable? I am of opinion that the case does not come within the principle which I stated in the outset governs the Court in the exercise of such summary jurisdiction.

The next question is whether the Court will exercise its summary jurisdiction to make *Mr. Leake* and *Mr. Redpath* liable in respect of loss sustained by the Plaintiff, by reason of negligence in the conduct of the cause.

[His Honor here entered into a minute examination of the details relating to the conduct of the cause, and proceeded thus :]—

It appears to me that from the filing of the bill in 1834, down to the year 1855, when the Plaintiff attained twenty-one, there has been a great deal of gross and continued negligence; but the gentlemen who are now sought to be made liable could only be made liable for the period during which *they* were respectively in the firm. *Mr. Redpath* has only been in the firm from the year 1846 down to 1852. It is true *Mr.*

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Redpath was, before he became a partner, the managing clerk of *Dean & Co.*, and in that capacity had an intimate knowledge of the suit; but I can only make him liable for the time during which he was actually a partner.

Then comes the question, whether the Court will exercise its jurisdiction in a summary manner to compel a solicitor to make good the loss arising from his negligence in the conduct of a cause? I confess it appears to me that if there were no authority on the subject, and I had only to reason from general principles, having regard to the fact that a judge of this Court must necessarily be better competent to judge of what amounts to negligence in the conduct of a chancery suit than a jury, or a court of law, I should think it reasonable that this Court should exercise its summary jurisdiction, and not leave the client to enforce his right by action at law. But it is my duty to administer the law as I find it laid down; and when I find a course of decisions one way, and none the other, I do not think it competent for me to overrule the authority of those decided cases. In some of the cases, indeed, there are dicta, particularly those cited from *Sayer*, which seem to assume that the Courts will exercise their summary jurisdiction against solicitors guilty of negligence in the conduct of a cause. In others of the cases cited it appears as if the view taken by the Courts of Law was, that if the negligence is extremely gross, the Court will exercise its summary jurisdiction; but if the negligence is not of so gross a kind, then the party will be left to his remedy by action, or any other remedy. If I were of opinion that I ought to be guided by that principle, I think the negligence in the present case has been very gross. But I am bound to say that I cannot concur in the

propriety of that principle. I do not think it would be a safe principle to rest the question on the amount or degree of the negligence. If the solicitor has a right to have the client's demand tried by a jury in one case, he must have the same right in another case. Therefore, putting aside the cases which seem to support the view I have adverted to, how do the other authorities stand? Two cases have been cited from *Sayer's Reports* in favor of the exercise of the summary jurisdiction. But there are many cases in which the Courts have refused to exercise the jurisdiction; and when I look at the authorities in this Court, I find no case in which the Court has exercised its jurisdiction simply on the ground of negligence in the conduct of the cause; and when the point was brought before the Vice-Chancellor of *England* in *Frankland v. Lucas*(a), that judge, after taking time to consider the question, came to the conclusion that this Court has no such jurisdiction. That was several years ago; and I am not aware that since that time there has been any case where that decision of his Honor has been questioned. I cannot take upon myself to decide in opposition to that authority.

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Sympathizing entirely with the Plaintiff, and not doubting but that the negligence in this case is sufficiently gross, I am obliged to come to the conclusion that I have no power to exercise this summary jurisdiction.

With regard to costs, the question is whether I should dismiss the petition with costs, or make no order as to costs on the petition; and it appears to me that the latter is the proper course. Although I have been

(a) 4 Simon, 586.

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unable to grant the Petitioner any relief, I do not think that I ought to give the solicitors their costs. That was the course followed by Lord *Langdale* in several similar cases.

July 8.

The Lords Justices on Appeal affirmed the Vice-Chancellor's decision in this case; but their Lordships added a clause, declaring that such dismissal was to be without prejudice to the Plaintiff's right to bring an action at Law.

June 15.

Powers.

NOEL v. NOEL.

THIS was a special case.

A testator being entitled to certain personal property, derived indirectly through the wills of *A.*, and of his father, settled part of it on his marriage, with a power of appointment among his children, leaving a fractional part in himself. He made his will "giving and bequeathing" all the personal estate that he derived through the will of his father to his two daughters, exclusively of his other children.

Lord *Wentworth* made his will on the 8th of June, 1805, and thereby he devised certain real estates upon trust for sale; and as to part of the produce of the sale upon trust for *Thomas Noel* the elder for life, remainder upon trust to pay 200*l.* a year to the widow of *Thomas Noel* the elder; remainder upon trust for the children of *Thomas Noel* the elder, in such manner as he should appoint.

The property was sold. *Thomas Noel* the elder had six children living in 1824, and by a deed poll made in that year he appointed 2,500*l.*, part of the fund, to *Thomas Noel* the younger, his eldest child. By another deed poll, made in 1831, he appointed the residue of the fund (with a certain exception) amongst his younger children.

Held, that the fractional part reserved to himself satisfied the language of the gift, and that it was not an execution of his special power.

Charles Noel, one of those younger children, by a deed made in 1836, settled his share, to which he was entitled either under the will of Lord *Wentworth*, or under the deed poll of 1831, as to 3,000*l.* upon certain trusts; and as to the residue, in the event of there being any residue, upon trust for himself; the 3,000*l.* was settled upon *Charles Noel* for life; remainder to his wife for life; remainder among his children as he should appoint; in default of appointment among his children; and, in default of children, to himself and his co-administrators and assigns.

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Charles Noel had by his marriage three children, *Mary Augusta*, *Katherine Emma* and *Charles Edward*.

He made his will in 1857, and thereby "he gave, devised and bequeathed all the real and personal estate, whatsoever and wheresoever, which he in any manner derived or became entitled to *by or through the will of his late father and the will of Lord Wentworth, or either of them*, whether in possession, reversion, remainder or expectancy, unto his two daughters *Mary Augusta Noel* and *Katherine Emma Noel*, equally to be divided between them, for their own absolute use for ever." He gave his household furniture and all other real and personal estate over which he might have any disposing power to his son *Charles* and his two daughters equally. *Charles Noel* took no interest under Lord *Wentworth's* will except such as he derived by means of the power of appointment vested in his father.

The question was, in what proportions, and among which of the children of *Charles*, was his share of the proceeds of Lord *Wentworth's* estate divisible; or, in

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other words, did his will operate as an appointment under his special power in the deed of 1836.

Mr. *Hobhouse* argued that the power was executed and operated on the 3,000*l.* to pass it to the Plaintiffs, the two daughters.

Mr. *Karslake* *contrd.*

The VICE-CHANCELLOR :

Judgment.

I assume that the question is limited to this, whether, under the clause in *Charles Noel's* will, the two daughters take the 3,000*l.*, in equal shares, by virtue of the special powers of appointment vested in *Charles Noel* by the deed of 1836. The general rule is not in contest. The question whether a testator has by his will executed a power, is a question of intention. And the rule by which to ascertain whether a will is an execution of a power is this: the will must contain express reference either to the *power* or to the *property* which is the subject of the power. The only question here, therefore, is, whether you find a reference either to the power or to the property. There is certainly no reference to *the power*; is there any reference to *the property*? Now the property, the subject of the power, is the 3,000*l.* which *Charles Noel* had by the settlement of 1836 severed from the share which he derived from his father's will, exercising the power contained in Lord *Wentworth's* will. He had parted with the 3,000*l.*; it was no longer his property, it belonged to his children; he had no right or control over it except to apportion it among his children; the residue or surplus of the share beyond the 3,000*l.* still remained his property, and he could will and bequeath it as he pleased. When, there-

fore, the will, in terms, not importing the exercise of a power of appointment, but proper for the absolute bequest of property belonging to the testator, "gives and bequeaths" that which he derived or became entitled to by or through the will of his late father and the will of Lord *Wentworth*, or either of them, I must conclude that he referred to the residue or surplus which still remained his property, and not to the 3,000*l.* which (although originally derived by or through the will of his father and the will of Lord *Wentworth*) was no longer his property. If, indeed, the 3,000*l.* was the only property which he had derived by or through the will of his father and the will of Lord *Wentworth*, or either of them, then, indeed, the Court might have been reduced to the necessity of supposing that he referred to the 3,000*l.*; but the residue or surplus beyond the 3,000*l.*, which still belonged to him, is sufficient to satisfy the words of the bequest; and therefore I must conclude that it was to that property that he referred, and not to the 3,000*l.* It is said, indeed, that the residue or surplus which, by the deed of 1836, *Charles Noel* retained to himself, is of small amount. But supposing this to be so, it cannot affect the construction of the will. It is immaterial what is its amount, if it be an interest capable of being disposed of.

There being, then, no reference to the power which *Charles Noel* had to appoint the 3,000*l.* among his children, and no reference to the property which was the subject of the power, the clause in question is not an exercise of this power, and the daughters do not, therefore, take the 3,000*l.* under it.

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June 15, 27, 28.

*Voluntary
Settlement.*

THOMPSON v. WEBSTER.

A person being in debt to the extent of 300*l.*, and having some other debts, applied to his mother for advances to pay the debts other than the 300*l.* She, not knowing of the debt of 300*l.*, refused, unless he would make a settlement of his property on his wife and children. Ultimately he acceded and did so, reserving to himself a life interest worth about 1,700*l.*; and he afterwards died insolvent not having paid the 300*l.*

Held, that the settlement was not, under the circumstances, made with intent to defraud creditors, and was good against the assignees of the insolvent.

Statement of the rule as to voluntary settlements, p. 632.

THIS was a bill filed by the assignee in insolvency, who was also a creditor of *Joshua Coupe*, against the trustees and *cestui que trust* of a post nuptial settlement made by *Coupe* on his wife and children, seeking to set aside that settlement.

Joshua Coupe was, in 1854, in possession of property, consisting partly of an estate in fee simple, called *Droylsden*; partly of a life interest of 55*l.* a-year charged on real estate; and of another life interest of 25*l.* a-year charged in like manner on real estate. The *Droylsden* estate yielded about 70*l.* a-year, but was charged with an annuity of 25*l.* in favor of Mrs. *Coupe*, the mother, who was, however, of very advanced age, so that *Joshua's* net income was not more than 125*l.* a-year. In the same year he had become surety for another person of the name of *Hewetson*, for 300*l.* In 1855, the principal not paying it, the creditor called upon *Coupe* to pay, and *Coupe* gave him his promissory note for 300*l.* and interest. Also, in 1855, he had become indebted to another person in a sum of 92*l.*, which not being paid, the creditor brought an action against him, and recovered judgment. Thereupon *Coupe* consulted his solicitor, and a friend of the family, Mr. *Webster*, who applied to Mrs. *Coupe*, the mother, to advance money to pay this debt and costs. Mrs. *Coupe*, Mr. *Webster* and the solicitor were not aware of the debt of 300*l.*, and Mrs. *Coupe* was under the impression that her son had only a life estate in the *Droylsden* property, of which he was in fact seised absolutely, and she had

supposed that it was settled, as she wished it to be, on her grandchildren. On being applied to, she, therefore, refused to advance the money unless *Coupe* would, in addition to giving her security, settle his estate on his wife and children. This he refused to do unless she would make a further advance, amounting in all to about 200*l.*, to clear him of some other debts and leave something over for his own use. On the other hand, the mother refused to do that unless she had also security for 210*l.*, an incumbrance on the *Droylsden* property which she had paid off. But throughout she insisted, as a condition of doing anything, on a settlement, subject to her mortgage, on *Coupe's* wife and children. Ultimately this was agreed to, and the mother advanced the money required, and took a mortgage for 400*l.*, covering her advance to her son and the payment of that 210*l.* And *Coupe* then, in January, 1856, conveyed to the Defendants, the trustees, all his *Droylsden* estate, upon trust for his wife and children, except his life estate, which he reserved, and which, upon the evidence in the cause, it appeared was of the saleable value of about 1,700*l.* The 300*l.* note was never paid. *Coupe* was sued upon it, and became insolvent, and died, and now the assignee sought to set aside the settlement of 1856, as fraudulent within the statute of 13 Eliz. c. 5.

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Mr. *Anderson* and Mr. *Collins* for the Plaintiff.

This settlement is void ; it is, upon the facts, made with intent to defeat or delay creditors. *Coupe* knew, if his mother did not, that he owed the 300*l.* It is said he reserved to himself ample estate to pay that over and over again. But what was the nature of that estate ? a life interest, which might cease the very next day.

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What the authorities require is, that the settlor should be in a position to pay his creditors out of absolute property; not out of contingent property. *Coupe*, when he made the settlement, must have known perfectly well the risk to which he was exposing his creditors. He knew that if called on to pay, he could not pay without a sale, which it might be impossible to effect before his death. That is not being solvent within the meaning of the statute and the cases.

They cited *Townsend v. Westacott* (a); *Frampton v. Frampton* (b); *Magawley's Trusts* (c); *Strong v. Strong* (d); *Matthews v. Feaver* (e); *Penhall v. Elwin* (f); *Sharf v. Soulby* (g); *Clough v. Lambert* (h); *Parker v. Carter* (i); *Goldsmith v. Russell* (h); *Jenkyns v. Vaughan* (l).

Mr. *Bazelgette* and Mr. *C. Hall* for the settlement.

I. A voluntary settlement is not void simply as such; there must be *fraud*. II. This is not a voluntary settlement, but a bargain.

1. A settlement to be set aside must be made with *intent* to defeat creditors. Where is the intent shown here? There was no creditor but the holder of the note, and the settlor had, at the time he made the settlement, property worth, according to the evidence, enough to pay it five times over. It is said it was a life estate. Is there any authority that a life estate is insufficient?—a

(a) 2 Beav. 340.

(b) 4 Beav. 237.

(c) 5 De G. & Sm. 1.

(d) 18 Beav. 408.

(e) 1 Cox, 278.

(f) 1 Sm. & Giff. 258.

(g) 1 M. & G. 364.

(h) 10 Sim. 174.

(i) 4 Hare, 409.

(k) 5 De Gex, M. & G. 549.

(l) 3 Drew. 419.

life estate bears its value, and if its value is far beyond the debt, how can a man, reserving to himself such a power of paying his debt, be said to have *intended* to defeat it? The question is not to be determined by matters *ex post facto*. It is not because the debt has ultimately not in fact been paid, that you are to infer an *intent* to delay it. You are to look whether the acts of the settlor reduced him to such a state of incapacity to meet existing liabilities, as is inconsistent with intent to pay; that cannot be said of this case.

2. This is not a *voluntary* settlement at all; it was a bargain. Mr. *Coupe* wanted money to pay a debt, he applies to Mrs. *Coupe* to lend it, and she refuses except upon condition that he would settle on his children; Mrs. *Coupe*, therefore, in effect bought the settlement by the advance; it was a bargain; it is a settlement, if not for actual money, at least for a valuable consideration received; for an advance refused except upon that condition. It was, therefore, a *contract* and not a mere *voluntary settlement*.

They referred to *Martyn v. M'Namara (a)*; *Shears v. Rogers (b)*.

Mr. *Anderson* replied.

The VICE-CHANCELLOR.


This bill is filed by a creditor who is the assignee under the Insolvent Debtors' Act, asking on the part of the creditors to set aside a settlement made by *Joshua Coupe*.

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Judgment.

(a) 4 Drew. & W. 411.

(b) 3 B. & Adol. 362.

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The question is, whether this settlement is void under the statute of Eliz. ?

The principle applicable to cases of this kind is now well settled. It is true that in former times a difference of opinion prevailed, and there have been fluctuations of opinion on the subject. Some of the cases seem to lead to this conclusion, that it is sufficient, in order to bring a settlement within the statute, to show that it was without valuable consideration ; that it was purely voluntary. Other cases appear to lay down the rule, not only that that is not the test, but that a deed is not invalid unless the settlor was indebted to the extent of *insolvency*.

Neither of these extreme views is now the rule. It is now clear that it is not sufficient that a deed is merely *voluntary*; on the other hand, it is not necessary, in order to set aside a voluntary deed, that the settlor should be actually in a state of *insolvency*. The principle now established is this. The language of the act being, that any conveyance of property is void against creditors if it is made with *intent* to defeat, hinder or delay creditors, the Court is to decide in each particular case, whether, on all the circumstances, it can come to the conclusion that the *intention* of the settlor, in making the settlement, was to defeat, hinder or delay his creditors.

In this case the circumstances are very peculiar; and I am free to confess that, during the course of the argument, my mind entertained a good deal of doubt. I think it one of the most difficult cases of the kind that has occurred.

The settlor, who was in humble life, had become, nevertheless, by inheriting from relations and otherwise, possessed of some property.—[His Honor then referred to the facts stated at the commencement of the report, and proceeded:]—*Joshua Coupe* executed the deed in question in January, 1856. There were two deeds of the same date, parts of one and the same transaction—the settlement and the mortgage to Mrs. *Coupe*. The effect of the settlement was to withdraw from creditors all the settlor's property, except his life estate; all his absolute property he assigned, reserving only his life estate. Those circumstances certainly do lead *prima facie* to the inference that he must have *intended* to defeat, hinder or delay creditors; and if there were nothing more, I certainly should feel bound to come to the conclusion that this settlement is a conveyance of property made with intent to defraud creditors. That would be my conclusion if it had been the settlor's own spontaneous act.

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But was it his spontaneous act? The evidence shows the contrary; that *Coupe* himself never thought of it, that it never occurred to his mind till it was pressed upon him by others. And what were the circumstances under which it was made? Being pressed by an action for debt, and liable to a judgment for the debt and costs, he applied to his solicitor, and to Mr. *Webster*, a friend of his family, and the object of his application was to see if they could induce his mother to advance him money to pay that particular debt of £92, and the costs. Now the mother, it appears from the evidence, was under the impression that the property held by *Joshua Coupe* in fee (the *Droylesden* property) did not belong absolutely to him, but was settled, after his death, upon his children; and she thought, also, that it had been

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bought originally with her savings. When she found she was mistaken on both these points, she was both surprised and disappointed, and she desired, both for the benefit of her grandchildren, and for the purpose of keeping the property in the family, that it should be settled, and then she says, "I will advance the money upon having it secured by a mortgage, provided that *Joshua* will make the settlement that I supposed to have been already made." When that proposition was put before him, he replies, "I will do that, if you will advance me more money" (as he required to pay some other small debts, and to have a little over for himself). And the mother then insists that she must have a mortgage to cover the £210 that she had previously advanced to pay off a charge on the *Draylesden* property, as well as the advance she was about to make. The result is, that Mrs. *Coupe* says, "I will advance you what, with the £210, will make up £400, on condition that, subject to my mortgage, you make a settlement of the property." That was the condition, or consideration; and it appears to me that the evidence shows that the condition was insisted on by Mrs. *Coupe*, and that settling his property had never, until it was made a condition of advancing the money by his mother, suggested itself to his, *Joshua Coupe's*, mind. It is perfectly true that in one sense there was no consideration. No money passed other than that for which Mrs. *Coupe* took an ample security. But what I have to look at is the construction of the statute. I am to look at this transaction to be whether it shows an intent to delay, hinder, or defeat creditors. Now, in that view, it is a material consideration whether Mrs. *Coupe*, Mr. *Webster* and the solicitor, who took part in this transaction of pressing upon *Joshua* the making of a settlement, knew of any other debt than the particular one

that was about to be paid. Did they know of the debt to the Plaintiff? I think I have quite sufficient evidence that they did not know anything about it. What, then, am I to say as to the *intention*? When I examine all the circumstances, can I come to the conclusion that *Joshua Coupe* made this settlement with an *intent* to delay, hinder or defraud his creditors. It appears to me that I cannot; and I think the transaction was perfectly *bonâ fide*.

The bill was dismissed with costs.

BROWNE v. SAVAGE.

THIS suit was instituted for the purpose of having the several priorities of the Plaintiff and the Defendant, as incumbrancers, determined by the Court; and the questions which arose were, whether the fact, of one of several trustees being himself in one case the assignor and in the other the assignee of the fund, constituted such a sufficient notice to the trustees of that fund as would, in the absence of any further notice to the trustees, give priority over subsequent incumbrances.

Francis Broderip, one of the Defendants, being possessed of 150 Belgian Bonds, of the value, in the whole, of 150,000 francs, and desiring to settle them upon his cousin *Charlotte Mary Savage*, on the 9th day

to prevail over subsequent incumbrancers, it being the interest of such trustee, *as assignor*, to conceal the assignment; but that where such trustee assigned his beneficial interest to one of his co-trustees, the notice which that co-trustee acquired, *as assignee*, constituted, during his life, notice to the trustees, it not being his interest, *as assignee*, to conceal the assignment, and therefore that it prevailed over subsequent incumbrancers with notice.

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June 11.

Notice.
Trustee.
Assignor.
Assignee.

Although, as a general rule, notice to one of several trustees is a notice to all, yet where one of such trustees was also a beneficiary, and assigned his beneficial interest in the trust fund to a stranger. Held, that the notice acquired by such trustee, *as assignor*, did not constitute notice to the trustees, so as

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of December, 1854, executed a declaration of trust, whereby it was declared that *Francis Broderip*, *William Broderip*, and *Robert Savage* (three of the Defendants), should stand possessed of the Belgian Bonds upon trust to pay the dividends and annual produce thereof to *Charlotte Mary Savage* during her life, and after her decease should stand possessed of one equal third part or share in the same Belgian Bonds, and the dividends and annual produce thereof, in trust for the Defendant *Robert Savage* the younger for his own benefit; and that they should stand possessed of another third part or share of the same in trust for *Arthur William Savage*, if he should live to attain the age of twenty-one years, but if he should die under that age, then in trust for the Defendant *Robert Savage* the younger; and that they should stand possessed of the remaining one-third part or share of and in the said Belgian Bonds in trust for the children of *Charlotte Mary Savage* as she should appoint, and in default of appointment, in trust for the Defendant *Robert Savage* the younger.

By an indenture dated the 11th of June, 1855, the Defendant *Robert Savage* the younger assigned, by way of mortgage, to the Plaintiff *Hannah Browne*, all the share to which he, the Defendant *Robert Savage* the younger, then was or might become entitled in the Belgian Bonds, and the dividends and annual produce thereof, under and by virtue of the declaration of trust of the 9th day of December, 1854.

The Plaintiff, on the 29th of June, 1858, gave the trustees formal notice, in writing, of the assignment to her of the 11th of June, 1855.

By an indenture dated the 15th of August, 1857, the

Defendant *Robert Savage* the younger assigned his interest in the Belgian Bonds by way of mortgage to the Defendant *Charles Winston*, but no notice of this assignment was given to the trustees until the 10th day of July, 1858.

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On the 29th of March, 1858, the Defendant *Robert Savage* the younger assigned all his interest in the Belgian Bonds, by way of mortgage, to the Defendant *Francis Broderip*, and on the 30th of July, 1858, the Defendant *Francis Broderip* gave his co-trustee, *William Broderip*, notice of this assignment.

There were also numerous other incumbrances, of which the trustees received notice subsequently to the notice given them by the Plaintiff.

Questions as to the priority of her own and the other incumbrances having arisen, the Plaintiff filed her bill, claiming to be entitled to priority over the other incumbrancers, and praying that the priority of the various incumbrancers might be determined by the Court. On the hearing of the cause it was referred to Chambers to ascertain the priorities of the several incumbrances; and the matter now came on, by way of adjourned summons, before the Court.

Mr. *Glasse* and Mr. *Dickenson* for the Plaintiff.

Notice to one trustee is notice to all; and therefore the notice which the Defendant *Robert Savage*, one of the trustees, must necessarily have had, as assignor, of the assignment which he executed to the Plaintiff, constituted good notice to the trustees on the 11th of June, 1855, the date of the assignment to the Plaintiff. It is not necessary that the notice to the

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trustees should be a formal notice. Moreover, the Plaintiff gave the trustees *formal* notice of the assignment to her before any of the other incumbrancers, and therefore, on both grounds, she is entitled to priority.

Mr. *Barber* for the Defendant *Francis Broderip*.

The assignment made by the Defendant *Robert Savage* the younger to Mr. *Francis Broderip* is entitled to priority over the assignments in favor of the Plaintiff and the other incumbrancers. Admitting that notice to one trustee is notice to all, yet it was the interest of *Robert Savage* the younger, as assignor, to conceal the assignment from his co-trustees, and therefore the Court will not hold that the notice he had, as *assignor*, constitutes good notice to the trustees. But the assignment in favor of Mr. *Francis Broderip* stands in a different position. He is trustee and *assignee*, and, as such *assignee*, it is his interest to give his co-trustees notice of the assignment to him, and therefore the notice he acquired as *assignee* is good notice to all the trustees. He, consequently, is entitled to priority over all the other incumbrancers, including the Plaintiff.

Mr. *Rudall*, Mr. *W. P. Murray*, and Mr. *R. O. Turner* appeared for other Defendants.

The following authorities were referred to in the course of the argument:—*Timson v. Ramsbottom* (a); *In re Hennessy* (b); *Ex parte Boulton* (c); *Re Barr's Trust* (d); *Warburton v. Hill* (e); *Thompson v. Speirs* (f); *Meux v. Bell* (g); *Semple v. Nicholson* (h); *Smith v. Smith* (i).

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|---------------------------|-----------------------|
| (a) 2 Keen, 35. | (f) 13 Sim. 473. |
| (b) 2 Dr. & War. 555. | (g) 1 Hare, 73. |
| (c) 1 De G. & Jones, 163. | (h) 32 Law T. 373. |
| (d) 4 Kay & John. 219. | (i) 2 Cr. & Mee. 231. |
| (e) 1 Kay, 73. | |

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The first question in this case is this : if one of several trustees of a fund is also beneficially entitled to a share of that fund in reversion, and makes an assignment to a stranger of such interest, whether the knowledge which that trustee of course has of his own assignment, in the absence of notice to his co-trustees, constitutes good notice, so as to give such assignment priority over subsequent assignments with notice.

In the ordinary case of an assignment by one of the *cestuis que trust* of his share of the trust fund to a third person, it is quite clear that, unless the person taking the assignment gives notice to the trustees, his assignment will not take priority over subsequent assignments with notice to the trustees ; and that, as between himself and subsequent assignees, he will take priority, not according to the date of his assignment, but according to the date of his notice.

The principle of this rule has been well stated by the Lord Justice *Turner* to be not for the security of the person taking the assignment against the danger of the trustees parting with the property in ignorance of the assignment, but to protect persons proposing to advance their money upon assignments of property of this description against prior assignments not disclosed to them. Such persons have no means of ascertaining whether any prior assignments, or charges, have been created but by applying for information to the trustees, who must, for their own security, give correct information, when inquiry is made of them, whether they have had notice of any prior assignments affecting their trust property.

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The question then arises, what constitutes good notice to trustees. As a general rule, notice to one of several trustees is sufficient, so long as that trustee lives. It is sufficient for the reason that a person who is asked to advance his money on the trust property, whether by way of purchase or of mortgage, ought, for his own safety, to apply to every one of the trustees; and if he omits to take that precaution, it is his own fault if he should suffer loss in consequence of the omission. If, then, notice to one trustee is sufficient, it is contended that, in the case of the assignor being himself one of the trustees, inasmuch as he is necessarily cognizant of his own assignment, that, of itself, constitutes a sufficient notice to one of the trustees, and that there is no necessity for notice being given to his co-trustees. Now it is true that it is not necessary that the notice to a trustee should be a notice formally given in writing; a verbal and informal notice is sufficient, provided the fact of the assignment is distinctly and clearly brought to the mind and attention of the trustee.

But in the case where the *assignor* is himself one of the trustees, he being the only one of the trustees who has any notice or knowledge of the assignment which he has made, if he should afterwards apply to another person to advance him a sum of money on an assignment of his interest, concealing the fact of the prior assignment, such proposed assignee could not, by any caution in making inquiry of all the trustees, discover the fact of the prior assignment; for it is the interest of the trustee, who is the proposed assignor, to conceal the prior assignment; and the other trustees know nothing about it. Such notice, therefore, would not effect the object for which notice to trustees is required; viz., the security of the party taking the assignment against prior

assignments concealed from him by his assignor. And therefore I am of opinion that, though Mr. *Savage*, being one of the trustees, had notice (as of course he had) of the assignment he had made to the Plaintiff, *Hannah Browne*, such notice was not sufficient to give her priority over a subsequent incumbrancer with notice.

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The second question is this : Suppose the *assignee* is one of the trustees, as is the case with Mr. *Francis Broderip*. Does his knowledge of the assignment which has been made to himself constitute sufficient notice, in order to give that assignment priority over subsequent assignments with notice ? It appears to me that it does. In the first place, I am of opinion that whatever brings the fact of the assignment distinctly to the attention and knowledge of the trustee is sufficient notice. Moreover, the trustee to whom the assignment is made not only has no interest in concealing the assignment from any one subsequently proposing to take an assignment, and making inquiry of him as to the existence of any prior assignment, he has, in fact, a double interest in making it known ; it is his interest to do so as trustee, that he may not make himself liable for giving false information ; and he is still more interested, as the assignee in making it known, that he may not peril the priority of his own incumbrance. The principle of the rule respecting notice to the trustees is thus entirely complied with by such notice as this. I am, therefore, of opinion that the notice which Mr. *Broderip* had, although not formal, being a knowledge of an assignment to himself, was good notice during his life, to give priority to his incumbrance over subsequent incumbrancers with notice, and also over prior incumbrancers without notice ; and that he stands in priority to the Plaintiff.

The other incumbrancers will rank according to the dates of their several notices to the trustees.

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June 24.

*Practice.
Closing Evi-
dence.*

*Subpœna to hear
Judgment.*

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Although under the old practice it was not competent for a Plaintiff to issue subpœna to hear judgment until after the period for passing publication; yet under the new practice, created under the 15 & 16 Vict. c. 86, s. 38, and the 32nd Order of the 7th of August, 1852, and the 5th Order of the 13th of January, 1855, a Plaintiff may issue a subpœna to hear judgment, and set down the cause for hearing after the closing the evidence, and during the period allowed for cross-examination, even when that period has been enlarged by order.

THIS was a motion on behalf of the Defendant to set aside the subpœna to hear judgment, and to strike the cause out of the paper for irregularity, on the ground that the Plaintiff was not entitled to set down the cause for hearing until the expiration of the time allowed for the cross-examination of witnesses on their affidavits.

The bill was filed to enforce the specific performance of a contract for the purchase of a house at *Dulwich*. Replication was filed on the 2nd of March; so that the period of eight weeks allowed for the taking of evidence expired on the 27th of April, but was extended, by an order, till the 11th of May. The time for the cross-examination expired on the 8th of June, but was extended till the 6th of July.

On the 10th of June, the Plaintiff obtained a subpœna to hear judgment, and set down the cause for hearing.

The Defendant now moved to set aside this subpœna for irregularity.

Mr. *Bazalgette* and Mr. *Charles Hall* in support of the motion.

The subpœna to hear judgment is irregular, and must be set aside. The Plaintiff was not entitled to set down the cause for hearing till after the closing of the evidence, and the evidence is not closed till after the time allowed

for the cross-examination of the witnesses on affidavit has expired. That was the view taken by the Court in the case of *Jenkyn v. Vaughan (a)*, where a motion made by the Defendant to dismiss, for want of prosecution, during the period allowed for cross-examination, was dismissed with costs.

Under the old practice, but one period was allowed for taking evidence; and the subpoena to hear judgment, under that practice, was not issued till one month after passing publication, *Ellis v. King (b)*; or, if publication had been enlarged, then not till one month after the expiration of such enlarged period; *Langley v. Fisher (c)*. Under the 38th section (*d*) of the Act for the Improve-

(a) 3 W. R. 151.

(b) 4 Mad. 126.


(c) 5 Beav. 589.

(d) The 38th sect. of the Act 15 & 16 Vict. c. 86, is as follows:—"The evidence on both sides, in any suit in the said Court, whether taken orally or upon affidavit, shall be closed within such time or respective times after issue joined as shall, in that behalf, be prescribed by any General Order of the Lord Chancellor, but with power to the Court to enlarge the same as it may see fit; and after the time fixed for closing the evidence, no further evidence, whether oral or by affidavit, shall be receivable without special leave of the Court previously obtained for that purpose: provided always, that any witness who has made an affidavit, filed by any party to a cause, shall be subject to oral cross-examination within such time after the time fixed for closing

the evidence as shall be prescribed in that behalf by any order of the Lord Chancellor, by or before an examiner, in the same manner as if the evidence given by him, in his affidavit, had been given by him orally before the examiner; and after such cross-examination, may be re-examined orally by or on the part of the party by whom such affidavit was filed; and such witness shall be bound to attend before such examiner to be so cross-examined and re-examined, upon receiving due and proper notice, and payment of his reasonable expenses, in like manner as if he had been duly served with a writ of *subpœna ad testificandum*, before such examiner; and the expenses attending such cross-examination and re-examination shall be paid by the parties respectively, in like manner as if the witness so to be

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ment of the Jurisdiction of Equity and the Orders of 1852 (a), and of 1855 (b), made under it, two periods are fixed for the taking of evidence, one for taking evidence in chief, and a further period for cross-examining witnesses on their affidavits; and the period under the new practice, which must be considered analogous to passing publication under the old practice, is not the closing of the evidence in chief, but the expiration of the period allowed for cross-examination.

Mr. *Baily* and Mr. *W. Forster*, for the Plaintiff.

The subpœna to hear judgment is quite regular. The period for cross-examination is always treated as running at the same time as the subpœna to hear judgment. It has been the practice in the Record and Writ Clerks' Office, ever since the Orders of 1852 and 1855, to issue subpœna to hear judgment after the closing of the evi-

cross-examined were the witness of the party cross-examining, and shall be deemed costs in the cause of such parties respectively, unless the Court shall think fit otherwise to direct."

(a) The 32nd Order of the 7th of August, 1852, is as follows:—"The evidence on both sides, in any cause to be used at the hearing thereof, whether taken orally (and including the cross-examination and re-examination of any witness or witnesses), or taken upon affidavit, is to be closed within nine weeks after issue joined therein, except that any witness, who has made an affidavit intended to be used by any party to such cause at the hearing thereof, shall be subject to cross-exa-

mination within one month after the expiration of such period of nine weeks."

(b) The 5th Order of the 15th of January, 1855, is as follows:—"The evidence on both sides, in any cause to be used at the hearing thereof, whether taken upon affidavit or orally (and including the cross-examination and re-examination of any witness or witnesses) is to be closed within eight weeks after issue joined therein, except that any witness who has made an affidavit intended to be used by any party to such cause at the hearing thereof shall be subject to cross-examination within one month after the expiration of such period of eight weeks."

dence in chief; and that practice is consistent with these Orders, otherwise there would be two periods for closing evidence.

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Mr. *Bazalgette* in reply.

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The object of this application is to set aside a subpœna to hear judgment, on the ground of irregularity. The time for closing the evidence, which had been enlarged to the 11th of May, expired on that day, and was not further enlarged. On the 10th of June following, just a month after the expiration of the time for closing evidence the subpœna to hear judgment was issued. The time for cross-examination was enlarged till 6th July.

It is contended that the Plaintiff was not entitled to set down the cause for hearing till after the time for cross-examination expired; and that, for this reason, the subpœna to hear judgment is irregular.

On the other hand, it is contended that there has been no irregularity; and that, although there is nothing specific in the Act of Parliament, or the Orders, it is the practice in the Record and Writ Clerks' Office to certify that the cause is in a fit state to be set down for hearing on the expiration of the period for the examination of witnesses, without waiting for the expiration of the time for cross-examination, upon which certificate the cause is set down, and the subpœna to hear judgment issues.

Assuming such to be the practice of the office, the question is, whether that practice is contrary to the intention of the legislature in passing the Act of Parlia-

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ment, or contrary to the intention of the Orders of this Court, founded on that statute.

Under the old practice there was one fixed period for the passing of publication ; and within that period all evidence was to be taken, and there was no further time allowed for cross-examination. At the expiration of that period the evidence was closed, and thereupon the cause was set down, and the subpoena to hear judgment issued. Then came the Act of Parliament, which established a totally different practice with respect to the examination of witnesses (a). By the 38th section of that Act it is enacted, that the evidence shall be closed within such time after issue joined as should be prescribed by a General Order of the Lord Chancellor. So far the Act clearly defines what is to be understood by the time for closing the evidence, which the Orders have now fixed at eight weeks from joining issue. If the 38th section had stopped there nothing could have been done afterwards with respect to taking evidence ; but the Act goes on to add a proviso that (notwithstanding the evidence being closed) witnesses by affidavit may be cross-examined afterwards, within such time after the closing of the evidence as shall be prescribed by a General Order of the Lord Chancellor. But the giving this additional period for cross-examination does not prevent the evidence being closed at the end of the first period. The second period given for cross-examination is not a part of the period prescribed for closing the evidence. The Orders framed in pursuance of that Act have fixed the period for closing the evidence at eight weeks from the time of issue joined, and the additional period for cross-

(a) 15 & 16 Vict. c. 86.

examination at one month from the expiration of the first period. It is true that these Orders, instead of using the language of proviso, as the Act does, use the language of exception in speaking of the additional period for cross-examination. But it certainly was not the intention, nor was it within the power of the Lord Chancellor, by those General Orders, to alter the effect of the Act of Parliament. And I am of opinion that the effect of the 38th section of the Act and of the Orders, taken all together, is that the time for closing the evidence is not at the end of the period fixed for the cross-examination of witnesses, but at the end of the prior period, now fixed at eight weeks from the time when issue is joined. And, as under the old practice the cause was set down, and the subpoena to hear judgment issued, at the closing of the evidence, so it should be now.

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The next question is, whether the practice, as stated, is unreasonable, and should not be allowed. It appears to me that the practice is quite consistent with good sense and the general intention of the legislature, which was to provide a better mode of examination in Chancery, and at the same time prevent parties from being able unnecessarily to delay the proceedings in the cause; and to postpone the issuing of the subpoena till the end of the additional period allowed for cross-examination would, in my opinion, be a most unnecessary delay.

It has been suggested that I took a different view of the point in the case of *Jenkyn v. Vaughan*, which has been referred to. But I do not think I there took a different view. That was a motion to dismiss a bill for want of prosecution made after the evidence had been closed,

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but before the expiration of the period for cross-examination; and I thought it monstrous that the Defendant should dismiss for want of prosecution, that time not having elapsed. It appeared to me that under the Orders of 1845, with regard to the dismissal of a bill, the period fixed by the old practice was analogous to the expiration of the period allowed for cross-examination, but it is different with regard to the present question.

It appears to me, therefore, that if the practice is (as alleged) to issue subpoenas after the closing of the evidence, it is in accordance with the Act of Parliament and the Orders of 1852 and 1855, and that it is a reasonable practice.

[His Honor intimated that, before finally disposing of the case, he would direct inquiries to be made of the Clerk of Records and Writs as to what the practice in that office really was.]

Mr. *Murray*, the Clerk of Records and Writs, subsequently attended in Court, and handed to the Vice-Chancellor the following written reasons for the practice of the office as to issuing subpoenas to hear judgment:—

“The setting down the cause immediately after the time for closing evidence, without reference to the month for cross-examination on affidavit, does not prejudice the parties in the cause, as the return of the subpoena to hear judgment does not expire before the month for cross-examination, and consequently the

cause cannot come on to be heard before the expiration of the month for cross-examination.

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“ It must be borne in mind that the month for cross-examination only applies when the evidence is by affidavit. When the evidence is *vivâ voce* before the Examiner, the cross-examination takes place pending the time for the examination in chief, and it would be inconvenient if not prejudicial to the parties, to have one practice for setting down the cause when the evidence is by affidavit, and another when the evidence is *vivâ voce*.

“ It does not appear by the Record and Writ Clerk’s book in what manner the evidence is taken, but only that the cause is at issue by filing a replication; and the eight weeks’ time for closing evidence is reckoned from the filing of the replication or from the order extending the time for going into evidence, which order invariably gives a month after the closing of the evidence to cross-examine (in case of affidavits), which month does not interfere with the hearing of the cause, it running concurrently with the return (one month from the date of the subpœna to hear judgment).

“ It sometimes becomes necessary to enlarge the time for cross-examination only, in which case the cause is marked in the Registrar’s book not to come on till after the expiration of the enlarged time. If the Plaintiff is to wait till the month for cross-examination has expired before he set the causes down for hearing, it will be a month’s delay.

“ When the new practice of giving a month for cross-examination on affidavit came into operation, the

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question was mooted in the office, and it was decided that the cause could be set down before the month expired, because it expedited the cause and no one was prejudiced.

“ By 45th Art. of 16th Order of 8th of May, 1845, Defendant may move to dismiss if Plaintiff do not set his cause down, and serve subpœna to hear judgment, within four weeks after publication has passed.

“ By the 46th Article of the 16th Order of the 18th of May, 1845, subpœna to hear judgment not to be returnable less than a month from the teste of the writ.”

The VICE-CHANCELLOR said, it appeared, from the statement furnished by the Record and Writ Clerk, that the practice was as alleged by the Plaintiff, and he saw no reason for altering it. The present motion, therefore, must be dismissed with costs.

NOTE.—The reporters are indebted to the courtesy of Mr. *Murray* for the above statement.

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April 21, 27.
June 13.

*Specific
Performance.
Chattels.*

FALCKE v. GRAY.

IN this case the bill was filed for a specific performance of a contract entered into between the Plaintiff Mr. *Falcke* and Mrs. *Gray*, one of the Defendants, by which Mrs. *Gray* had agreed that, at the expiration of a six months' lease to the Plaintiff of her furnished house, he should have the option of purchasing two china jars at the price of 40*l*.

In January, 1859, the Plaintiff, being desirous of finding a furnished house, applied to Mrs. *Gray*, who was willing to let hers, and on looking over it, he observed the two jars, the subject of the suit. He had for twenty-five years carried on the business of a dealer in curiosities, china, &c., and was eminent in his trade, and was well acquainted with the prices which articles of this kind would fetch.

Shortly afterwards he had an interview with Mrs. *Gray* at her house; and Mr. *Brend*, from the office of *Boyle & Bryden*, estate and house agents, who were Mrs. *Gray's* agents in the matter, attended to advise Mrs. *Gray*. A discussion arose as to the terms of letting, and ultimately a rent of seven guineas per week was agreed upon, with an option to the Plaintiff that he should at the end of the term be at liberty to purchase certain articles of furniture at a valuation, to be inserted in the agreement, including the two china jars, which were valued at 40*l*.

With regard to the valuation of these jars at 40*l*., it

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appeared from the evidence that Mr. *Brend* told Mrs. *Gray* that he did not know the value of the jars, but he should think they were worth 20*l.* a-piece; and the agreement was drawn up, putting the value of 40*l.* on the jars, and was signed by Mrs. *Gray* and the Plaintiff.

On the 26th of January the Plaintiff went to the house while his agent was taking the inventory, and then the jars had been removed; and on the same day Mrs. *Gray* came to Mr. *Falcke's* house, and informed him of the removal of the jars. During the interval between the 19th and the 26th of January Mrs. *Gray*, having begun to doubt whether the price placed on the jars was fair, was advised that it would be as well to take the opinion of Mr. *Watson*, also a dealer in curiosities; and, on the 26th, she accordingly went to Mr. *Watson*, and desired him to come in the evening to value the jars. This he did; and on seeing the jars he was so much struck with their beauty, &c., that he offered Mrs. *Gray* his cheque for 200*l.* for them at once. Mrs. *Gray* then asked Mr. *Watson* if he thought she would be doing anything wrong in so selling them, and he told her it was all right; and she then took his cheque and Mr. *Watson* took away the jars. Mr. *Watson* was made a Defendant to the bill.

The Plaintiff now insisted that he was entitled to a decree for specific performance against Mrs. *Gray* and to delivery of the jars as against Mr. *Watson*; and on that part of the case the question was whether the transaction was a *bonâ fide* one on the part of *Watson*, or whether he knew of the contract between Mrs. *Gray* and the Plaintiff. The Defendant insisted that it was a contract for chattels, and could not be enforced.

The evidence as to the actual value of the vases was conflicting, but putting it at the lowest it greatly exceeded 40*l*.

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Mr. *Baily* and Mr. *Waller* for the Plaintiff.

On the question of the jurisdiction of the Court to order delivery of a chattel, the rule to be drawn from all the authorities is this: if you show that the Plaintiff cannot have adequate relief by damages the Court will order the chattel to be delivered up.

Here we cannot obtain adequate relief in damages. There is conflicting evidence as to the value of the vases—their value is purely fanciful, depending on the imaginary value that one or a few individuals may chance to attach to them. They are extremely rare; they are not like a horse or any other thing that you may go and buy in the market. There may not be another similar pair of vases in England. [They cited on this point *Pusey v. Pusey*, and *Duke of Somerset v. Cookson* (a); *Pearne v. Lisle* (b); *Fells v. Read* (c); *Lloyd v. Loaring* (d); *Lady Arundell v. Phipps* (e); *Earl of Macclesfield v. Davis* (f); *New Brunswick and Canada Railway and Land Company v. Muggeridge* (g); *Claringbould v. Curtis* (h); *Doloret v. Rothschild* (i).

Then as to the mode in which the agreement was entered into. Mrs. *Gray* and *Falcke* were at arm's length; she was protected by her own agent. Admit that Mr. *Falcke* knew the value of the vases, and that she did not, that skill was his property, he had a right

(a) Referred to in White and Tudor's Leading Cases, pp. 529, 530.

(b) Amb. 75.

(c) 3 Ves. 70.

(d) 6 Ves. 777.

(e) 10 Ves. 148.

(f) 3 Ves. & B. 16.

(g) 7 Week. Rep. 369.

(h) 21 Law J., N. S. 541.

(i) 1 Sim. & Stu. 598.

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to use it. There is no rule that a purchaser is obliged to communicate to a vendor the general knowledge that he has acquired by great pains and time. Besides, Mrs. *Gray*, if she did not know the value of the vases, might have consulted some one who did. *Falcke* in no way attempted to prevent her doing so—but left her to do as she liked; she thought fit to put her own value on the vases, and she must abide by her own agreement.

Mr. *Glasse* and Mr. *Jones Bateman* for Mrs. *Gray*.

First. This is a hard bargain; the evidence shows that Mrs. *Gray's* agent was as ignorant of the value of objects of vertu as she was herself; she was not, therefore, in fact protected. It may be true that Mr. *Falcke* did not in terms prevent her from consulting any one else, but practically he did, for he would give her no time; he insisted on the bargain being struck at once or not at all.

Secondly, on the jurisdiction: the Court, it is admitted, does not enforce specific performance of a contract to sell a chattel, unless damages cannot afford a remedy. What is there here to bring this case within the authorities cited? It is said the vases are very rare, but it is not pretended they are unique; for any thing that appears to the contrary dozens of them might be obtained; they are not like a single work of art, standing alone in the world; they are a common article of manufacture. Then why should not damages be an adequate remedy? It is said the price is fanciful; that is true in the sense of its being a fictitious value, but not in the sense of there being no market value. Such vases bear a given value for sale in the market just as pictures do, and a jury could perfectly well, on the evidence of dealers, assess the damages.

Further, the Common Law Procedure Act, 1854, sect. 78, provides for delivery of chattels improperly held; and, therefore, at law, if damages are not adequate, delivery can be obtained, and why should the Plaintiff invoke the extraordinary jurisdiction of this Court?

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Mrs. Gray ought not to have been a party to the suit; against her a decree is impossible. If the Court cannot give relief against *Watson*, it cannot against her, as she has not the chattels. If it can be obtained against *Watson*, she is not a necessary party. They cited *Kimberley v. Jennings* (a); *Fells v. Read* (b); *Lowther v. Lowther* (c); *Pooley v. Budd* (d).

Mr. Greene and Mr. Speed for Mr. Watson.

This Court never exercises its jurisdiction in specific performance, unless the transaction is a perfectly fair one. We do not impute here actual fraud, but can it be said that this is such a transaction as this Court will assist? An article worth some say 200*l.*, some say as much as 300*l.* or 400*l.*, obtained for 40*l.*; and by whom? by a gentleman familiar with these matters dealing with an elderly lady entirely ignorant of them! It is not to be heard that she was protected by her agent; he was as ignorant as she was. It is equally idle to say there was no pressure; Mr. *Falcke* would not give her time to consult any other person. It was 40*l.* at once or there is an end of the bargain. That was practically pressure.

Then as to the jurisdiction. The cases cited are all cases where the purchaser has held a fiduciary position,

(a) 6 Sim. 340.
(b) 3 Ves. 70.

(c) 13 Ves. 95.
(d) 14 Beav. 34.

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except *Doloret v. Rothschild*, and there the Plaintiff could not obtain the very thing he had bought without the aid of this Court, and damages were not a compensation. Here they would be, for it is not pretended there was any *pretium affectionis* in Mr. Falcke's mind, and it is not shown that plenty of similar vases could not be obtained. The presumption is that they could. It is a case not for the interposition of this Court, but of a Court of Law—and at law, both under the act cited by counsel for Mrs. Gray, and by the 19 & 20 Vict. c. 97, s. 2, delivery as well as damages may be obtained. They cited *Doloret v. Rothschild* (a); *Shaw v. Fisher* (b); *Wynne v. Price* (c); *Pollard v. Clayton* (d); *Turner v. Harvey* (e).

[The Vice-Chancellor intimated to Mr. Baily that he need only reply on the question whether the transaction was, having regard to the *res gesta*, such a fair transaction as this Court would assist.]

Mr. Baily accordingly replied on that point.

[The Vice-Chancellor reserved his judgment, and on the 13th June delivered the following judgment:]—

The VICE-CHANCELLOR.

[After stating the facts above stated.]—The first ground of defence is, that this being a bill for the specific performance of a contract for the purchase of chattels, this Court will not interfere. But I am of

(a) 1 Sim. & Stu. 597.

(b) 2 De G. & Sm. 11.

(c) 3 De G. & Sm. 310.

(d) 1 Kay & John. 462.

(e) Jac. 169.

opinion that the Court will not refuse to interfere simply because the contract relates to chattels, and that if there were no other objection, the contract in this case is such a contract as the Court would specifically perform.

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What is the difference in the view of the Court between realty and personalty in respect to the question whether the Court will interfere or not? Upon what principle does the Court decree specific performance of any contract whatever? Lord *Redesdale* in *Harnett v. Yeilding* (a) says: "Whether Courts of Equity in their determinations on this subject have always considered what was the original foundation for decrees of this nature I very much doubt. I believe that from something of habit, decrees of this kind have been carried to an extent which has tended to injustice. Unquestionably the original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed." So that the principle on which a Court of Equity proceeds is this. A Court of Law gives damages for the non-performance, but a Court of Equity says: "that is not sufficient,—justice is not satisfied by that remedy;" and, therefore, a Court of Equity will decree specific performance, because a mere compensation in damages is not a sufficient remedy and satisfaction for the loss of the performance of the contract.

Now why should that principle apply less to chattels? If in a contract for chattels damages will be a sufficient compensation, the party is left to that remedy. Thus

(a) 2 Sch. & Lef. 549.

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if a contract is for the purchase of a certain quantity of coals, stock, &c., this Court will not decree specific performance, because a person can go into the market and buy similar articles, and get damages for any difference in the price of the articles in a Court of Law. But if damages would not be a sufficient compensation, the principle, on which a Court of Equity decrees specific performance, is just as applicable to a contract for the sale and purchase of chattels, as to a contract for the sale and purchase of land.

In the present case the contract is for the purchase of articles of unusual beauty, rarity and distinction, so that damages would not be an adequate compensation for non-performance; and I am of opinion that a contract for articles of such a description is such a contract as this Court will enforce; and, in the absence of all other objection, I should have no hesitation in decreeing specific performance.

The next ground of defence is, that the contract in the present case is a hard bargain between the Plaintiff and Mrs. Gray; and it is insisted that the inadequacy in price is so great, that on that ground the Court will not decree specific performance. Now the price put on these jars was 40*l.*; what was their actual value? Certainly to talk of their value is to talk of something which is very artificial and fluctuating, depending upon the taste and caprice of the community. But still the jars derive their value from their beauty, distinction and rarity, and those qualities give them a selling value. They have a value in the market. According to the Plaintiff's own statement their value would be 100*l.*, or if between persons not brokers 125*l.*; and it is the interest of the Plaintiff to represent their value as low

as possible. A better test of their value is what Mr. *Watson* has given for them; and I think I may assume that 200*l.* at least would be a fair price, though I cannot help thinking that their real value rather exceeded than fell short of that sum. But taking 200*l.* as the fair value, the price placed on the jars by Mr. *Brend* was only one-fifth of their selling value. That this was a hard bargain in the sense of its being for a very inadequate price there can be no doubt; and the Defendant insists that, on this ground, the Court will not enforce specific performance.

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On the other hand, the Plaintiff insists that, although it is true that in hard bargains, using the terms in one sense, the Court will not decree specific performance, still that that does not apply to cases of mere inadequacy of price; and this is the question I have now to consider.

The general rule with regard to hard bargains is, that the Court will not decree specific performance, because specific performance is in the discretion of the Court for the advancement of justice; such discretion, indeed, to be exercised, not according to caprice, but on strict principles of justice and equity. In the case of *White v. Damon* (a), Lord *Eldon* says, "I agree with Lord *Rosslyn* that giving a specific performance is matter of discretion; but it is not an arbitrary capricious discretion. It must be regulated upon grounds that will make it judicial." The principle upon which the Court acts with respect to hard bargains appears to me to have been truly expressed by Lord *Langdale* in the case of *Wedgwood v. Adams* (b); and the passage in which he enunciates the principle has been quoted with approbation

(a) 7 Ves. 30.

(b) 6 Beav. 600.

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by Lord Justice *Turner* in *Watson v. Marston* (a). Lord *Langdale* in *Wedgwood v. Adams* says, that the Court exercises its discretion and decrees specific performance, unless it would be highly unreasonable to do so; and that what is more or less unreasonable cannot well be defined—it must depend on the circumstances of each particular case.

As it is admitted by the Plaintiff, that in cases of hard bargains generally the Court will not interfere, it is not necessary to go into any of the cases on the subject other than those which turn more or less on inadequacy of price. And here, I may observe, that in some cases the Court has refused specific performance on the ground of the hardness of the bargain, where there has been not the least impropriety of conduct on the part of the person seeking specific performance. In most of the cases there has been some other ingredient besides mere inadequacy of price; but I will refer to those in which I find the opinion of the Judges express on that particular point.

In *Young v. Clerk* (b) the Defendant agreed to grant a lease of certain lands to the Plaintiff for fourteen years at a rent of 40*l*. The Plaintiff had already been lessee of the same lands for many years, and knew that the value of the lands was not 40*l*. but 167*l*., and in that case specific performance was refused; but there was in that case the circumstance that the Defendant having recently come into possession of the land came to look at it, and stayed at the Plaintiff's house, and desired to see the Plaintiff's underleases, in order to ascertain what the Plaintiff had realized from the property. The Plaintiff evaded showing him the under-

(a) 4 De G., M. & G. 239. (b) Prec. in Chan. 538.

leases, and the Defendant remained in ignorance of the true value of the land. If the bill had been to set aside the contract, it would not have succeeded. Lord *Thurlow* said, "I must take it to be the law, that if a man contracts to purchase an estate for a certain price, and the intending purchaser knows at the time that there are mines under the estate of which the vendor is ignorant, still, as this Court is not a Court of honor, the Court will not set aside the contract on a bill by the vendor; but nobody can doubt that the Court would not decree specific performance of such a contract; and there is a wide distinction between a case in which the Court would, on the one hand, decree specific performance of an incomplete contract, and, on the other, set aside a complete contract." And in giving judgment the Lord Chancellor said, that this Court was not bound to decree a specific execution of articles where they appeared to be unreasonable, or founded on a fraud, or where it would be unconscionable to assist them.

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The next case is *Kien v. Stukeley* (a), which was a bill in the Equity side of the Court of Exchequer by the vendor for the specific performance of an agreement for the purchase of land, for which the purchaser had agreed to pay forty years' value. It was proved in the case that the Plaintiff had left his deed with the Defendant, and that there were no objections to the title; but a decree was made for specific performance. On appeal, the House of Lords entertained great doubt whether such a bargain should be carried out by a Court of Equity, but they came to no decision on that point.

The next case is *Southwell v. Nicholas* (b). In this

(a) 1 Brown's Par. Cas. (b) Reported in a note to
191; S. C. Gilb. Rep. 155. *Howell v. George*, 1 Mad. 9.


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case the Plaintiff's father and the Defendant *Nicholas*' brother, having some houses in *Spring Gardens*, agreed to purchase two old houses and pull them down to make an entrance into *Spring Gardens*. The houses were pulled down, and the Plaintiff's father paid his share of the purchase-money. The Defendant's brother died, and his estates were sold for the payment of his debts. On a bill by the Plaintiff for the specific performance of the agreement as to the two houses, it was contended by the Defendant that there should be no specific performance, as his brother's estates had been sold, and there would be no consideration accruing to him for the expense he would be at. The Master of the Rolls was inclined to decree that the parties should pay for the two houses in proportion to the value of their houses to be benefitted; but the matter was compromised by parties agreeing that the Plaintiff should pay two-thirds and the Defendant one-third for the two houses.

The next case is *Vaughan v. Thomas (a)*. In this case the Defendant agreed with the Plaintiff for the sale to him of an annuity of 300*l.* a year for the Defendant's life, at five years' purchase. The Defendant then represented himself as being only fifty-five years of age, and the Plaintiff insured the Defendant's life on that footing; but two years afterwards he discovered that the Defendant was sixty-one years of age at the time of granting the annuity, and the Plaintiff was obliged in consequence to increase the insurance. Upon his representing this to the Defendant, it was agreed that the Plaintiff should grant to the Defendant an additional annuity, which was expressed to be granted for 250*l.*, but in fact no money was paid on that occasion. In December, 1779, the Defendant applied to

(a) 1 Br. C. C. 556.

the Plaintiff to re-purchase the annuity, and an agreement was entered into by them by which the Plaintiff agreed to give up the annuity on payment of 1,500*l.*, the original purchase-money, and all arrears then due, deducting the sum of 200*l.*, the amount for four years of the additional annuity of 50*l.* The arrears then due were 475*l.*, so that the sum settled for the re-purchase was 1,775*l.* After the agreement had been signed the Plaintiff struck out his name, and two days after another agreement was prepared, whereby the Plaintiff relinquished the annuity and all arrears for 2,000*l.* The Plaintiffs filed a bill for the specific performance of this agreement. It was referred to the Master to find the value of the original and additional annuity and the Defendant's age. The Master found that the annuity was worth nine years' purchase when it was granted. The Plaintiff contended that the bargain was fair, and that he was entitled to the assistance of the Court to carry it into execution, but the Master of the Rolls was of opinion, that if they assisted the Plaintiff they would be sanctioning a very unconscientious bargain, and that the Plaintiff was not entitled to the aid of the Court. The bill was therefore dismissed.

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In the case of *Heathcote v. Paignon* (a), there was nothing but inadequacy of price, and the Master of the Rolls referred it to the Master to report on the actual value. The Master found a value of 500*l.*, for which only 200*l.* had been given, and the Court refused specific performance. On appeal, this decision was affirmed by Lord *Thurlow*, and the contract was set aside as being unjust.

The next case I shall mention is *Day v. Newman* (b).

(a) 2 Brown, 167.

(b) 2 Cox, 77.

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In that case the Court refused to decree specific performance, but left the parties to their remedies at law on the ground of inadequacy in price. That case appears to me to be a distinct decision on the question.

White v. Damon (a) was a case of a purchase at an auction; yet Lord *Rosslyn*, on the simple ground of inadequacy in price, refused specific performance. This case therefore shows that inadequacy in price is a sufficient ground for refusing specific performance. Lord *Eldon* took a different view, but it was on the ground that the sale was by auction.

Now these two last-mentioned cases appear to me to be decisive on the point; and I am of opinion that in the present case I ought to refuse specific performance on the mere ground of inadequacy of price, even if there were none other.

But there is another circumstance in this case besides mere inadequacy. What was the nature of the transaction? It was not the case of a bargain between seller and buyer, the one trying to get the highest, and the other to give the lowest price. The intention of the parties was that a fair and reasonable price should be placed on the articles, and that the Plaintiff should have the option of purchasing at such fair and reasonable price. Mrs. *Gray*, though she was told by Mr. *Brend* that he was not a judge of the value, thought that the 40*l.* mentioned by him was such a fair price as a competent person would place on the jars; and it was upon that footing that she made the agreement. She was not herself a competent judge, though she knew they were of considerable value. Mr. *Falcke*

(a) 7 Ves. 30.

knew that she was contracting on that footing, and he knew that the price put upon the jars by *Brend* was not a fair price.. [The Vice-Chancellor, after going through the Plaintiff's evidence, from which it appeared that he (knowing that 40*l.* was greatly insufficient, it being only two-fifths of the value, as he said) allowed the contract to be signed on that footing, proceeded:]—The question is, whether he can come to the Court to compel Mrs. *Gray* to sell the jars to him for 40*l.* I admit that this Court is not a Court of honor, but it appears to me, that although Mr. *Falcke* has done nothing he was legally bound not to do, yet, consistently with the authorities and the justice of the case, I must refuse specific performance.

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It has, however, been contended that Mrs. *Gray*, having sold the jars to the Defendants the *Watsons*, should not have been made a Defendant. But Mrs. *Gray* has placed herself in such a position that the suit could not go on without her being made a party. The bill, therefore, must be dismissed without costs as against her.

With regard to the Defendants the *Watsons*, the question is, whether they had notice, when they purchased from Mrs. *Gray*, that she had entered into an agreement, by virtue of which she could not sell them to another person. Now I cannot help entertaining some suspicion that the *Watsons* knew something more than that a mere question had arisen as to value. But the onus of proving that they had notice lies on the Plaintiff, and I think that, although there is some doubt on the evidence, notice to them has not been sufficiently proved. Under all the circumstances, I think the bill, as against the Defendants the *Watsons*, must be dismissed with costs.

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Nov. 8, 9.

Demurrer.
Jurisdiction.

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Where a bill is filed seeking to rectify an instrument and for the appointment of new trustees, the Court, though it may not be able to rectify the instrument, will grant relief so far as to appoint new trustees.

Therefore, where a bill was filed to rectify a settlement in a foreign form, and praying the appointment of new trustees, and the Defendant demurred to the bill for want of equity and for want of jurisdiction, the Court overruled the demurrer, but without costs, the Plaintiff not satisfying the Court that he would be entitled at the hearing to have the settlement rectified.

Semble, that want of jurisdiction and want of equity, being two distinct grounds of demurrer, ought, if the Defendant intends to raise them both on the record, to be stated as two distinct and separate causes of demurrer.

THIS case came on upon a general demurrer to the whole bill.

The bill was filed by "*Elizabeth*, the wife of *Frederick Charles Barber*, now residing at *Bridge of Allan*, in *Scotland*, by *William Ogilvie*, of No. 1, *Cushion Court*, *Old Broad Street*, in the city of *London*, her next friend."

The bill contained the following statements:—

That *John Wright*, the father of the Plaintiff, duly made his will on the 30th of December, 1841, and that he thereby gave all the residue of the whole of his real and personal estate, after payment of debts, &c., to his son *John James Wright*, and his daughter *Elizabeth Wright*, share and share alike, the same to be paid them as they should respectively attain the age of twenty-one, or in the case of his daughter on the day of her marriage, which should first happen, provided she married with consent, as thereafter mentioned: and the said testator directed his executor to pay to his daughter, in the event of her marrying under age with consent, such portion of such share of his residue as he should think fit; and he directed the remainder to be settled

upon her and her children ; but he declared that, in case his daughter should marry without consent, that the whole of the share to which she would be entitled should be settled on her and her children, she only being entitled to a life interest in the same, and that the testator appointed *James Wright* and the firm of *Griffith & Co.*, of *Madras*, executors of his will.

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That the testator, *John Wright*, died in *London*, on the 28th day of June, 1842, and that his will was proved in *London* on the 4th of January, 1843, and also in *Scotland* and in *Madras*, a large part of the testator's property being in *India*.

The bill further stated, that the Plaintiff *Elizabeth Barber* was born on the 28th day of November, 1825, and that she intermarried under age, with the consent of *James Wright*, the testator's executor, with the Defendant *Frederick Charles Barber*, of *Bridge of Allan* ; and that the executor *James Wright*, under the special powers given him by the will of *John Wright*, caused an instrument of settlement or antenuptial contract in the Scotch form to be executed, dated the 14th day of July, 1846, and prior to the marriage, whereby the property, which she was entitled to have settled on her and her children under her father's will, was settled on her for life, and after her death on her children, whom failing on her next of kin, with power to the Plaintiff to dispose by will (test upon) a part of the same ; and that *John Innes Wright*, the brother of the Plaintiff, was appointed trustee of the settlement.

That *John Innes Wright* had acted as such trustee ; and that the trust fund had become vested in him ; and that he had died in May, 1858.

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That *James Wright*, the executor named in the will of the testator, was in *Scotland*, out of the jurisdiction of the Court.

The bill prayed that it might be declared that the settlement of the 14th day of July, 1846, was not a proper settlement, and that the ultimate trust for the benefit of the Plaintiff's next of kin was not authorized by the will; that the settlement might be rectified, or that a proper settlement of the trust funds might be directed; and that trustees might be appointed in the place of *John Innes Wright*, the deceased trustee.

The Defendants to the bill were *Frederick Charles Barber*, the Plaintiff's husband, *James Wright*, the executor, and *Woodes Rogers*, the executor who had proved the will of *John James Wright* in *England*.


To this bill the Defendant *James Wright* demurred, and for cause of demurrer showed "that the said Plaintiff had not by her said bill made such a case as would entitle her in this Court to any discovery or relief from or against this Defendant touching the matters contained in the said bill, or any of such matters," and upon this demurrer the case now came on to be heard.

Mr. *Anderson* and Mr. *Bush*, in support of the demurrer.

This is a demurrer for want of equity, and to the jurisdiction of this Court.

The Plaintiff, and also her husband, are described in the bill as being resident in *Scotland*, and it is also

stated that the trustee is in *Scotland*. The property is Scotch subject-matter, and the contract was made in *Scotland*, so that the *forum domicilii*, the *forum rei sitæ* and the *forum contractûs* must all be held to be Scotch (a). The marriage contract is stated by the bill to be in a Scotch form, and it contains Scotch law terms not judicially known to this Court; it must be construed according to the Scotch law, and the bill is defective in not stating the effect of such Scotch law. Even supposing that the Court can construe the marriage contract, and that this Court has jurisdiction, the Plaintiff has not made out such a case as will entitle her to have it rectified by the Court.

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Mr. *Baily* and Mr. *Druce*, for the Plaintiffs.

The Defendant, by appearing, has submitted himself to the jurisdiction of this Court, and he cannot now demur to the jurisdiction.

This is the case of an English will, carried out by a settlement in a foreign form, and there is nothing in the case which renders it improper that this Court should exercise its jurisdiction. The will is an English will, and must be construed by an English Court; and the fact of the contract which carries out the will being in a Scotch form can make no difference, except that the Court may require evidence as to the meaning of certain terms in that instrument.

The bill prays the appointment of new trustees of the settlement; and the Court, even if it cannot rectify the settlement, will grant this relief. This of itself is sufficient to support the bill.

(a) Story's Conflict of Laws, §§ 537—539.

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Mr. *Anderson* in reply.

The following authorities were cited:—*Innes v. Mitchell* (a); *Trollop v. Linton* (b); *Millard v. Duke de Fitzjames* (c); *Duncan v. Cannan* (d); *Duke of Brunswick v. King of Hanover* (e); *Meiklan v. Campbell* (f).


The VICE-CHANCELLOR.

I will first consider the question of the jurisdiction. On the part of the Defendant it is insisted that this is a demurrer to the jurisdiction as well as for want of equity. Upon this point I must refer to the demurrer itself. The demurrer seems to have been framed with the intention of embracing, in language which is adapted to express only one cause of demurrer, two distinct causes of demurrer, viz. want of jurisdiction and want of equity. The terms of the demurrer are these:—“And for cause of demurrer sheweth that the said Plaintiff has not by her said bill made such a case as entitles her in *this Court* to any discovery or relief, &c.” This is a very slight variation from the common form of a demurrer for want of equity, the common form being in “a Court of Equity,” while in this demurrer the words are “in *this Court*.”

Although it is not material to the decision of this case, it appears to me that this is an improper form of demurrer, and that the ground of want of jurisdiction and the ground of want of equity, which are two totally

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| (a) Ante, p. 57; <i>S. C.</i> on appeal, 1 De G. & Jo. 423. | <i>Vianna</i> , 1 B. & Ad. 284. |
| (b) 1 Sim. & St. 477. | (d) 7 De G., M. & G. 78. |
| (c) Cited in <i>De la Vaga v.</i> | (e) 6 Beav. 1. |
| | (f) 24 Beav. 100. |

distinct grounds, ought, if it is intended to comprise them both in the same demurrer, to be stated on the record as separate and distinct causes of demurrer. But this is not very material; because, if I am to regard this as a demurrer only for want of equity, which in truth it is, the Defendant may demur for want of jurisdiction *ore tenus*.

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Assuming then the Defendant to have demurred for want of jurisdiction (whether on the record or *ore tenus* is not material), I am of opinion that the demurrer on that ground must be overruled; for the whole argument of the Defendant on this point is founded upon the assumption of facts, which, however material it may be to consider them, if proved, when the case comes on for hearing, whether the omission of them in the bill has or has not been intentional, are not stated in the bill, and are not necessarily inferable from what is there stated. The Defendant demurs on grounds which do not sufficiently appear on the face of the bill. Now that is not a proper case for the defence to be by demurrer, which must be founded on facts alleged by the bill. If there be any facts not alleged by the bill of which the Defendant desires to avail himself, his proper course is not to demur, but to plead those facts. It therefore appears to me that, so far as relates to the ground of want of jurisdiction, I cannot allow this demurrer.

Whether I should have allowed the demurrer for want of equity, if the bill had only sought to rectify the settlement, it is not necessary for me to decide; because there is one simple ground on which at all events I must overrule the demurrer for want of equity, namely,

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that this is a bill not only to rectify the settlement, but also seeking the appointment of new trustees; and I see no reason why the Court, even although it should not think fit to rectify the settlement, should refuse to appoint new trustees. On this ground alone I must overrule the demurrer for want of equity.

With respect to the merits of the case, I should not have called for any argument until the hearing, but that question arises with reference to the costs. I do not now mean to express any opinion on the question, whether the Plaintiff is entitled to have the settlement rectified. All I will say is, that I am by no means satisfied that she will be entitled to that relief when the cause comes on to be heard; and, therefore, I am of opinion that the demurrer should be overruled without costs.

1859.
Nov. 21, 22.

*Mesne Profits.
Separate Estate.
Trustee.*

WRIGHT v. CHARD.

THIS case arose upon the claims decided in the cause of *Wright v. Vernon* (a). The bill was filed by *William Wright*, the administrator *de bonis non* of *Atherton Watson*, a lunatic, who died intestate on the 1st May, 1851.

The bill in this case referred to the suit of *Wright v. Vernon*, instituted in 1852, the effect of the decision in which was, to declare that the "*Samwell* estates" were entailed on the issue of Sir *T. Samwell*; that the Plaintiff in that suit was entitled in right of his wife to a portion of those estates on the death of *A. Watson*; and that *A. Watson* was at his death, and had been from 1849, tenant in tail of a portion of them. During the period elapsing between 1849 and the death of *A. Watson* in 1851, *Leicester Vernon* and his wife *Emily* (Defendants in *Wright v. Vernon*) had remained in possession of the estates (ultimately determined to belong to *A. Watson* and the Plaintiff in *Wright v. Vernon*), and Mr. *Chard*, trustee for Mrs. *Vernon*, had received rents thereof, amounting to 4,500*l.*, which he had handed over to Mrs. *Vernon*.

(a) 2 Drew. 439.

Court never gives an account of rents beyond the filing of the bill; but it is a rule of discretion, and where the circumstances justified delay, the Court gave an account of rents antecedent to the filing of the bill.

III. Where a married woman received rents of an estate as her separate property, claiming to be entitled, but it turned out that she was not entitled, the Court refused to give relief to the real owner against her other separate estate.

IV. *Semble*, that a married woman may make her separate estate liable by parol engagement as well as by express contract; but there must be some engagement or contract.

I. A trustee or apparent trustee for *A.*, who was in possession of an estate, was also committee of *B.*, a lunatic, who claimed the estate, and the trustee was perfectly aware of the claim. On a bill being filed to recover the estate for *B.*, it was decided that the estate was his. Held, that the trustee was liable to *B.* for the rents received by him and paid to *A.*

II. The rule of the Court of Chancery, in a suit to recover land in the nature of equitable ejectment, is not that the

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Of the estates so claimed by the *Vernons*, Mrs. *Vernon* claimed to be tenant for life for her separate use; she had also other considerable separate estate.

Both Mrs. *Vernon* and her husband, and the trustee *Chard*, one of the Defendants in this suit, had clear notice, while in possession as above stated, of the claim of *Watson* and the *Wright* family; and *Chard*, before and on the hearing of *Wright v. Vernon*, had taken an active part in favor of Mr. and Mrs. *Vernon*, adversely to the *Wrights*, the claimants.

In this suit it was alleged, but not proved, that Mr. *Vernon* had received rents; it was alleged and proved that *Chard* had received rents, and had paid them over to Mrs. *Vernon* as his *cestui que trust*. *Chard*, besides being the trustee of Mrs. *Vernon*, was also, during the whole period of the contest, the committee of *Atherton Watson*.

The bill prayed an account of rents and profits, as against Mrs. *Vernon's* separate estate, and as against *Chard* the trustee, and sought to charge Mr. *Vernon* with an occupation rent for occupation of the house during the life of *Atherton Watson*; that Mr. *Vernon* and *Chard*, and also the separate estate of Mrs. *Vernon*, might be charged; and under this prayer an account of and payment for timber cut by Mr. *Vernon* was asked at the bar; but though the bill charged receipt of *rents*, it did not in terms charge *waste*, nor the receipt of *profits* as against Mr. *Vernon*.

The questions principally argued were:—

I. Whether the Defendant *Chard*, being committee of the lunatic tenant in tail, was not bound to retain

the rents, having notice of the claim of his lunatic; or whether he was on the contrary not bound to pay them over to his apparent *cestuis que trust*.

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II. Whether Mrs. *Vernon's* other separate estate was liable to refund the rents which she had (having no title thereto) received. There was no allegation or proof of any contract, written or by parol, by Mrs. *Vernon* to repay the rents. On the contrary, she had throughout insisted on her adverse title; and if she was liable at all, it was purely on the ground that she had received what did not belong to her.

Mr. *Glasse* and Mr. *Smythe* for the Plaintiff.

I. As to Mr. *Chard*, he was as much trustee for the lunatic as for Mrs. *Vernon* while the claim was contested. He had no right or authority to decide who was entitled; and if he did, it was at his own peril. He was in fact, with notice of our claim, paying away our money to a party for whom he was, it is true, apparent trustee, but for whom, in the result, he turned out not to be trustee at all, because the property did not belong to her beneficially.

II. As regards Mrs. *Vernon's* separate estate, that is liable; *Murray v. Barlee* (a); *Owens v. Dickenson* (b). As to her separate estate the authorities show that a married woman is a *quasi feme sole*. She may bind it without any contract. The principle is not that she binds it by her contract, for she is incapable of making a contract; but if she incurs a liability, incurred on the faith of her having separate estate, the Court says it is inequitable, it is a species of equitable fraud that that liability should not be fulfilled; and the Court, not the contract, fastens the liability on her separate estate.

(a) 7 Sim. 194.

(b) Cr. & Phill. 48.

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III. As to Mr. *Vernon*, he is liable, as allowing his wife to receive and participating in the enjoyment of that which was not hers. As it turns out that the rents were not hers, she did not receive them as *cestui que trust* to her separate use, but received them as her husband's agent to his use. He therefore is liable. At any rate he is liable to an occupation rent for the habitation of the house, and for cutting timber.

They cited also *Hulme v. Tenant* (a).

Mr. *Baily* and Mr. *Renshaw* for *Chard*.

Mr. *Chard* acted under a trust instrument, on the face of which he was trustee for Mrs. *Vernon*, and she was in possession. What right or power had he to refuse to pay to his *cestui que trust* because another person made a claim. It appears that proceedings took place in lunacy, in which the very question, whether *Watson* should take any steps to recover the estates, was discussed, and the Master in Lunacy was of opinion that he should not.

Besides, assuming that *Chard* did wrong, it is not the practice of this Court to give, in a case of contested title, back rents beyond the filing of the bill. In *Wright v. Vernon* you refused to give any back rents as against Mr. *Chard*, and what it was right to do then it is right to do now.

Mr. *Swanston* and Mr. *Sidney Smith* for Mr. and Mrs. *Vernon*.

It is sought to charge Mrs. *Vernon's* separate estate. But the principle has been inaccurately stated. There must be intention on the part of the married woman to

(a) 1 Br. C. C. 16.

render her separate estate liable. We do not say that intention must be evidenced in writing; but it must be either clearly shown or arrived at by inference. And there is no case in which separate estate has been held liable in which there has not been actual or implied contract. Here, there is the very reverse of contract, either actual or implied. Mrs. *Vernon* resisted the claim; so far from either promising to pay, or acting in such a manner as to imply promise, she insisted that the rents were hers, and that she intended to keep them.

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The following cases were also cited in the course of argument:—*Jones v. Harris* (a); *Parry v. Allen* (b); *Thomas v. Thomas* (c); *Vaughan v. Vanderstegen* (d).

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The facts of this case are very short. Under the wills of *Frances Anne Langham* and *Philles Langham* made in 1827 certain portions of the estates, called in the pleadings the *Samwell* estates, were limited to divers persons, with an ultimate limitation to the right heirs of Sir *Thomas Samwell* by *Mary* his second wife (e).

The life estate did not expire till October, 1849. If by the limitations contained in the wills an estate tail was given to the persons successively answering the description of the right heirs of Sir *Thomas Samwell* by his second wife, then upon the expiration of the estates for life in October, 1849, *Atherton Watson* became entitled to the estate as tenant in tail in possession; but

(a) 9 Ves. 486.
(b) 7 De G., M'N. & G.
409.

(c) 2 Kay & J. 79.
(d) 2 Drew. 182.
(e) See 2 Drew. p. 443.

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if on the other hand the effect of those limitations was to give to such persons an estate in fee, then *Atherton Watson* had no interest in the estate; but Mr. *Chard* was entitled as trustee for the *Vernon* family. It is insisted, that the question on the construction of those wills was a very doubtful question. I agree that it was so far doubtful, that no one would venture to say that the case was perfectly clear until after a careful investigation of the terms of the instruments, and due consideration of the authorities bearing on the point. But, I confess, it does appear to me that when the matter has been sifted, the case as decided in *Wright v. Vernon* is entirely free from doubt.

But, be that as it may, as the matter has been decided, *Atherton Watson* became entitled to these estates as tenant in tail in possession, when *Frances Drought* died in 1849. Between that time and his death in 1851, he was entitled to the rents and profits of the estate. These he never received, being a lunatic, found so by inquisition. The question now raised is, whether his legal personal representative is entitled to recover these rents and profits; and the present bill is filed by his administrator for that purpose. At the time of the death of *Frances Drought*, the question as to the right to the property was known to exist, and with the knowledge of the existence of that question, Mr. and Mrs. *Vernon* and Mr. *Chard*, their trustee, entered into possession and continued in possession during the life of *Atherton Watson*, and down to the decree in the suit of *Wright v. Vernon*; and the question now to be decided is, whether the personal representative of *Atherton Watson* is entitled to recover from Mr. and Mrs. *Vernon*, or from their trustee, Mr. *Chard*, those rents and profits which belonged to *Atherton Watson*.

Primâ facie the proper remedy for the recovery of these rents and profits would be an action at law; but it is admitted that, under the circumstances, it is in a Court of Equity that the right to recover the rents must in the present case be asserted (a).

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One ground taken by the Defendants is, that no relief can now be given, as the bill was only filed in 1856 to recover rents accrued between 1849 and 1851; and that the Plaintiff has by his delay lost all right to relief. I cannot concur in this contention. So far as relates to the fact that no proceedings were taken in the lifetime of *Atherton Watson*, it must be remembered that he was a lunatic, and that the person whose duty it was to assert his rights was Mr. *Chard* himself, who was all the time receiving the rents as trustee for Mrs. *Vernon*, and this entirely accounts for no bill having been filed during the lifetime of *Atherton Watson*.

Upon the death of *Atherton Watson* the estate tail devolved upon Mrs. *Wright*, who very shortly afterwards filed a bill to try the right to the estate; and if at that time another bill had been filed by the representative of *Atherton Watson* to try the very same question, it would have been justly said that by so doing he was involving the parties in unnecessary litigation; and I think that the representative of *Atherton Watson* was fully justified in waiting to see the result of Mrs. *Wright's* suit. Nor would it have been proper to unite the claim of *Atherton Watson's* representative in Mrs. *Wright's* bill. Such a bill, under the old practice, might have been demurred to for multifariousness; and although it is true that the

(a) The legal estate was outstanding upon old incumbrances, and *Wright v. Ver-* non was heard and decided on that footing.—REF.

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practice as to multifariousness has been changed, that does not alter the principle. It appears to me that the delay in filing the bill is sufficient ground for refusing relief.

Then it is contended that the rule of equity, where a Plaintiff succeeds in establishing his right to an estate in this Court, is to order an account of rents and profits only from the date of the filing of the bill, and that I acted on this principle in *Wright v. Vernon*. This is quite true. In an action of ejectment at law, and for mesne profits, so far as the Statute of Limitations is no bar, the rents and profits may be recovered to the full extent of the demand, although for a period long before the commencement of the action. But a Court of Equity, though acknowledging this legal right, will not allow a person who comes and invokes the extraordinary aid of the Court for the recovery of the estate to have that aid, except upon such terms of *reasonableness* as the Court considers right; and inasmuch as, ordinarily, the person making the demand might have come sooner, and in many cases the person against whom the demand is made has received and spent the rents under an honest though mistaken supposition that he was entitled to the estate, the Court considers it a fair and reasonable general rule to limit the account of those rents to the filing of the bill; though it must be admitted that this is a rule rather of mercy and indulgence than of right. But the Court will not apply this rule where there are special circumstances which would render its application unreasonable; and in this case there are such special circumstances. There are the special circumstances that *Atherton Watson* was a lunatic, and incapable of asserting his own rights; and that the very person whose duty it was as his committee to maintain

his rights actually claimed and received the rents adversely to him, and as trustee for other persons. These special circumstances are quite sufficient to prevent the application to this case of the rule of equity insisted upon by the Defendant. There must be an account of the rents for the whole period during which *Atherton Watson* was entitled to the estate as tenant in tail in possession.

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Then comes the question, against whom is the Plaintiff entitled to recover. There is sufficient allegation by proof that rents have from time to time been received by Mr. *Chard* during the life of *Atherton Watson*. Mr. *Chard* insists that no relief can be obtained as against him, because he only received the rents and profits in his character of trustee for Mrs. *Vernon*, and that he handed them over to her. Suppose Mr. *Chard* had not been Mrs. *Vernon's* trustee, there can be no question but that he would be liable. How does the fact of his handing the rents over to Mrs. *Vernon*, that is, improperly applying the rents, take away that liability? It appears to me that Mr. *Chard* cannot on that ground escape from his liability.

Mr. *Chard* also contends that he cannot be called upon for the rents and profits, inasmuch as he accounted in the lunacy for all he was liable for on account of the estate of *Atherton Watson* in his character of committee. But these rents he received not in his character of committee; and how can the fact that he has accounted for what he received as committee be a discharge for monies received by him in another character.

I think, therefore, that Mr. *Chard* is liable for all the rents and profits he actually received, and that he

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was not discharged by reason of his having paid them over to Mrs. *Vernon*, nor by reason of his having passed his account as committee of the lunatic.

With regard to the claim against Mr. *Vernon*. The Plaintiff seeks to make him liable for occupation rent of so much of the premises as he occupied, for the rents he is alleged to have received, and for the proceeds of the timber he is alleged to have felled. With regard to the occupation rent, I have no doubt but that he is liable. It is said, indeed, that he was only in occupation of the property as being his wife's separate estate; but neither Mr. nor Mrs. *Vernon* had any right to be in occupation; and although he was in possession during the period when he *thought* it was his wife's separate property, that turns out to be a mistake; and I must regard him as a stranger, who, thinking he has a right, enters into occupation, and he turns out to be wrong.

With regard to the rents, it does not appear in evidence that he ever received any rents, and, therefore, he is not liable to that account.

With regard to the proceeds of the timber, there is no specific allegation in the bill as to timber; there is not even a general allegation that Mr. *Vernon* received rents *and profits*. The *allegation* is confined to rents. There is no general allegation which can include timber. There being no such allegation in the bill there is, of course, nothing in the answer about timber. The Plaintiff has produced an affidavit to show that Mr. *Vernon* cut timber. Supposing that he did so, he cannot be made liable upon such a claim upon the production of evidence which has no allegation in the bill, either

general or special, to support it. I cannot make Mr. *Vernon* liable in respect of timber.

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The remaining question, which is a somewhat nice one, is how far Mrs. *Vernon's separate estate* can be made liable for the monies so handed over to her by Mr. *Chard*.

Having been referred to my judgment in *Vaughan v. Vanderstegen (a)*, I may say, that I fully adhere to the opinion I there expressed, as reported at page 183 of Mr. *Drewry's Reports*, as to the state of the law on the subject:—"It may therefore, I think, be considered to be the doctrine of this Court, that the engagements and contracts of a married woman having property settled to her separate use, at least such of them as are in writing, are to be regarded as debts, or in the nature of debts; and that her property so settled is liable to the payment of them as such; and that this principle is entirely founded on the doctrine of Courts of Equity by which she is constituted a feme sole as to that separate estate. It has not yet indeed been made the subject of positive decision, that the principle embraces her verbal engagements, or cases of common assumpsit; but in the 7th edition of Lord *St. Leonard's* work on Powers, published in 1845, his Lordship observes, (though without referring to *Murray v. Barlee (b)* or *Owens v. Dickenson (c)*,) that the prevailing opinion then was, that her separate estate was not liable to general demands upon her. Considering however the opinions I have referred to, and the reason of the thing, I think it very probable when that question arises for decision, it will be answered in the affirmative." My present impression is

(a) Ante, Vol. 2, p. 165.

(c) Cr. & Ph. 48.

(b) 3 My. & K. 209.

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that the principle ought not to be confined to her *written* contracts or engagements. There has however been no decision, that *parol* contracts are charges on the separate estate.

It is not however now necessary for me to express any opinion on that particular question; for if, according to the present state of the law, the question still remains undecided whether a married woman's contracts in order to bind her separate estate must be in writing, or whether a *parol* contract is sufficient, that very question assumes that there must be at all events *some* contract or engagement. Supposing it to have been decided that it was not necessary to have a written contract, then indeed the question would arise whether any act, such as the mere employment of a tradesman or solicitor, would be sufficient to bind her separate estate, or whether there must be a formal promise to pay. If I had that question before me, I should on principle be disposed to hold, that if a married woman employed a tradesman, that would constitute an implied contract to pay, and would be sufficient to bind her separate estate, without any actual words of agreement to pay. But that question does not arise in this case, because the question I have now to determine is whether in the absence of *any* contract at all, written or verbal, express or implied, I can make a married woman's separate estate liable. That question certainly has never been decided in the way contended for by the Plaintiff; if it had been, it could not be an undecided and doubtful question, whether the contract must be in writing, or whether a *parol* contract is sufficient. Here, Mrs. *Vernon* received from Mr. *Chard* certain monies, which it now turns out she had no right to receive; and it is quite clear that there was no contract on her part to refund them. And

even if you could imply such a contract with Mr. *Chard*, there was not even an implied contract with the Plaintiff. The Plaintiff who seeks to charge her separate estate must make out at least *some* contract or engagement with him on her part. But they were not even in communication with each other.

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Whenever this doctrine with regard to the separate estate of married women is finally settled, it may be, that not only general *verbal engagements*, but that all liabilities which attach under similar circumstances to a male adult, will attach to married women having separate estate. The doctrine is now in a state of transition, and is not clearly established in all its points; but the modern tendency has been to establish the principle, that if you put a married woman in the position of a feme sole in respect of her separate estate, that position must be carried to the full extent, short of making her personally liable. But while I find that there is a preliminary question yet remaining to be decided, namely, whether the contract must be in writing in order to affect her separate estate, I cannot make Mrs. *Vernon's* separate estate liable in the absence of all contract.

The bill must be dismissed as to Mr. and Mrs. *Vernon*, so far as it seeks to make her separate estate liable.

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*Company.
Partnership.
Plea.*

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A bill by a company alleged that the Defendant had agreed to accept shares.

The articles of association were silent as to the mode of acceptance, and the Joint Stock Companies Act, 1856, sect. 9, and Sched. B. applied, by which the acceptance must be in writing signed. Defendant had never signed an acceptance. This fact and the statute were set up by plea.

Held, I. The plea was bad in form, as it raised no fact not raised by the bill.

II. The agreement was a good agreement to do that which the statute required.

III. The decree would not be nugatory, as in a joint stock partnership a partner cannot put an end to the partnership, but only to his own quality of shareholder; he must remain shareholder, or constitute another person shareholder in his place.

IN this case a company had been formed in *England* for adopting a colonial association formed for constructing a railway in *Canada*.

The memorandum and articles of association were set out in the bill, but as the point in the case turned not on what was in them, but on what was not in them, it is not necessary here to set them out: the articles of association did not prescribe any regulation as to the acceptance of shares.

The Defendant signed an application for shares, and deposited it at the company's office, and paid a deposit. It was in the following form:—

“To the Directors of the *New Brunswick and Canada Railway and Land Company*.

“Gentlemen,—Having paid into the hands of the Messrs. — *Bank, of London*, the bankers of the proposed company, the sum of six hundred pounds, I request you will allot me one hundred shares of Class A, two hundred shares of Class B in the said undertaking,

and hereby agree to accept such shares or any less number that may be allotted to me, and to pay the future calls thereon.

“ Signature . *W. Muggeridge.*

“ Profession . Corn Merchant.

“ Residence . *3, Fowkes Buildings, Great
“ Tower Street, City.”*

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In consequence of this application shares were allotted to the Defendant.

The other material facts stated in the bill appear in the Vice-Chancellor's judgment: the substantial question argued was, whether upon the agreement of the Defendant to take shares, having regard to the decision of a Court of Law to the effect that such acceptance would not enable the Plaintiff to sue at law, a bill would lie to compel performance of it.

The bill stated that an action for calls had been brought in the Exchequer against the Defendant, and the Court was of opinion that the Defendant's agreement to take shares was not an acceptance within the Joint Stock Companies Act, 1856, so as to enable the Plaintiffs to recover at law.

The bill was in effect for specific performance, and it prayed that the Defendant might be ordered to sign an acceptance of his shares and to pay the calls due upon them.

To this bill the Defendant put in the following plea and answer:—That the said *New Brunswick and Canada Railway and Land Company, Limited*, is subject to the provisions of the Joint Stock Companies Acts, 1856, and that by the 9th section of the Joint

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Stock Companies Act, 1856, it is enacted that the memorandum of association required by the 3rd section of the said act may be accompanied by, or have annexed thereto or endorsed thereon, articles of association signed by the subscribers to the memorandum of association, and prescribing regulations for the company, but if no such regulations are prescribed, or so far as the same do not extend to modify the regulations contained in the table marked B in the schedule thereto, such last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company, and shall bind the company and the shareholders therein to the same extent as if they had been inserted in articles of association and such articles had been registered; and that by the 19th section of the same act it is amongst other things mentioned that every person who has accepted any share in a company registered under the said act, and whose name is entered in the register of the shareholders, and no other person (except a subscriber to the memorandum of association, in respect of the shares subscribed for by him) shall for the purposes of the said act be deemed to be a shareholder: and this Defendant avers that the first of the regulations contained in the said table marked B is in the words following: "No person shall be deemed to have accepted any shares in the company unless he has testified his acceptance thereof by writing under his hand in such form as the company from time to time directs," as by the said act appears: and this Defendant avers that the articles of association set forth in the said bill did not prescribe any regulation as to the acceptance of shares in the said *New Brunswick and Canada Railway and Land Company, Limited*: and this Defendant further for plea saith, that neither he this Defendant, nor any person by him lawfully authorized, did ever testify his acceptance of any share or shares in the said com-

pany by writing under his hands, all which matters and things this Defendant doth aver to be true and is ready to prove as this honorable Court shall award; and therefore he doth plead the same in bar to the said Plaintiff's bill, and prays the judgment of this honorable Court whether he shall be compelled to make any further or other answer to the said bill: and this Defendant, not waiving his said plea, but wholly relying and insisting thereon and in aid and support thereof, for answer unto so much of the said bill as he is advised it is material or necessary for him to make answer unto, answering saith, that he this Defendant was not well or at all aware that his name was entered on the register of shareholders in the *New Brunswick and Canada Railway and Land Company, Limited*, as a shareholder in respect of the fifty A class shares and 200 B class shares in the said bill mentioned, or any or either of them respectively, until the action at law in the said bill mentioned was commenced against this Defendant, and that he never did consent to or acquiesce in his name being inserted in the said register as a shareholder in the said company: and this Defendant prays, &c.

Mr. Glasse and Mr. F. Waller for the Defendant, in support of the plea.

This matter has been before a Court of Law in an action brought for calls, and the decision was, that an action would not lie. That amounts to a decision that at law there was no acceptance of shares within the Joint Stock Companies Acts, 1856 and 1857. If there is none at law there is none in equity. The material sections are the 9th and 19th, and the schedule, table B, is important. All that the Defendant has done is to write a letter, saying he agrees to accept. But to constitute acceptance it must be given in a form prescribed. The neglect to comply with the formalities required to

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make a valid legal contract invalidates any agreement in equity: *Jackson v. North Western Railway Company* (a).

If this were an agreement which under ordinary circumstances this Court could enforce, it cannot here, because, immediately on the Defendant being made a shareholder, he may, by the very constitution of the company, dissolve *quoad* himself and his co-partner, the partnership; and in such a case the Court could not interfere: *Sheffield Company v. Harrison* (b). [They referred to and distinguished *England v. Curling* (c), observing that that was the only case in which an agreement to enter into a partnership was ever enforced.]

Is there any case in which this Court has ever enforced an agreement on which action would not lie? The jurisdiction is ancillary, not original. The Court enforces performance of a legal agreement when damages will be an inadequate compensation, but if no action will lie, it is because there is no legal contract; and if there is no legal contract, what is there for this Court to enforce? They cited also *Re Neilson* (d).

Mr. *Baily* and Mr. *Locock Webb*, for the Plaintiff, referred to *Wynne v. Price* (e).

This Court will place Mr. *Muggeridge* in the same position as if he had from the beginning performed his contract. His contract is to accept; that is a contract to do all acts necessary to constitute a legal acceptance. It is a strange equity for a party to assert that, though he has agreed to do certain things, he shall not be bound because he has wilfully neglected to do them.

(a) 6 Railw. Cas.
 (b) 17 Beav. 294.
 (c) 8 Beav. 129.

(d) 23 Law Journ. (Bankruptcy) 12.
 (e) 3 De G. & Sm. 310.

Suppose Mr. *Muggeridge* desired to accept, can it be doubted that he could compel the company under that agreement to do all acts requisite on their part? If that is so, where is the mutuality if he can depart from his contract and they cannot?

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They cited also *Cookney's Case* (a).

Mr. *Glasse* in reply.

It has been decided and is settled that a mere agreement to accept shares creates no liability: *Hutton v. Upfill* (b). If so, how can this Court be asked to force on a party a liability never created by his own act? No precedent of such a bill as this can be found, except the case of *England v. Curling* (c), which we submit is not founded on principle. Here the only thing in question is the payment of calls, and that could be enforced at law, if there was a valid agreement. But the Court of Law has said there is not. To support this bill would be to create quite a new head of equity.

The VICE-CHANCELLOR reserved his judgment.

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March 24.

This case comes before the Court by way of plea. The bill is filed by a joint-stock company against Mr. *Muggeridge*, and it prays that the acceptance of shares by him in the manner set out in the bill may be declared to be a complete acceptance of those shares, and asks that he may be ordered to pay the calls which have been made. The joint-stock company are, in effect, asking that the Defendant may accept shares which he

(a) 32 Law Times, 82.

(c) 8 Beav. 129.

(b) 2 H. of L. Cas. 674.

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has undertaken to accept. The bill sets out a number of acts of the legislature of *New Brunswick* and of the imperial parliament, the effect of which was that a corporation was created for the purpose of making a railway in *Canada*, and the shares in that company were to consist of two classes, A and B, and the shareholders of class A were also incorporated into a separate and distinct corporation. In July, 1856, a joint-stock company was projected in *England*, to be called *The New Brunswick and Canada Railway Company*. That company was projected under the Joint-Stock Companies Act, 1856, and the object of the company was to take a transfer from the colonial corporation of the whole of its rights and liabilities; and accordingly a memorandum of association was subscribed, by which the registered office of the company was established in *England*, and the objects of the company were set out, and the nominal capital of the company was stated to be 800,000*l.*; and in pursuance of the act of 1856, there was a document appended to it, stating the articles of association and regulations of the company, and by these regulations the shares were divided into three classes, A, B, and C. The regulations prescribed by schedule B to the act of 1856 are to be the regulations of every company, except so far as they are affected by the regulations of any particular company; and the regulations of this company do not in any way affect the regulations in schedule B, so far as relates to the question of acceptance of shares.

In July, 1856, a contract was made by the projectors of this new company with the colonial corporation for a transfer of their property to the new company.

The prospectus of the company prescribes that the

capital shall consist of 800,000*l.*; divides the shares into classes; and goes on to describe what the expected profits are estimated at, and terminates, "No call shall exceed 2*l.* per share, with an interval of three months between each." Every application must state the class of shares it is for, so that any person applying for shares must pay 2*l.* per share for the whole number applied for, and the company would return him the difference in respect of the shares they did not give him. The applications for shares received by the Plaintiffs, the directors, exceeded the number of shares they had to allot. Mr. *Muggeridge* applied for shares, and paid to the bankers of the company 600*l.* as a deposit of 2*l.* per share on 300 shares which he intended to apply for, 100 in class A and 200 in class B; and he received from the bankers their receipt for that sum. He on the same day sent in to the directors a written application for shares in the prescribed form (a).

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On the 29th July a meeting was held, at which the shares in the company were allotted, and fifty shares in class A and 200 in class B were allotted to Mr. *Muggeridge*, and, together with the letter of allotment, Mr. *Muggeridge* received on the 29th of July a cheque for 100*l.* in respect of which shares had not been allotted to him.

On the 14th of August following, the secretary of the company forwarded to Mr. *Muggeridge* a copy of the articles of association for his signature, which was in the following form:—

"Form of Memorandum consenting to be a shareholder.

"I, —, of —, do hereby accept — shares in

(a) See ante, p. 686.

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the *New Brunswick and Canada Railway and Land Company, Limited*, established under a memorandum of association and articles of association duly registered, and I consent to be registered as such shareholder accordingly in the register of shareholders of the company."

"Signature ——."

This Mr. *Muggeridge* did not sign.

The contract between the colonial corporation and the joint-stock company was carried out, and on the 25th September, 1856, the company was completely registered, and Mr. *Muggeridge* was registered as the holder of 250 shares.

On the 30th of April, 1857, Mr. *Muggeridge* not having signed the articles of association, the secretary of the company sent him a letter in the following terms:—"The warrant for the interest due on your shares is lying here waiting the exchange of your scrip for share certificates. If you have mislaid your scrip, you can send the bankers' receipt for deposit and letter of allotment along with the articles of association signed, and I will forward you in exchange the interest warrant and share certificates."

Mr. *Muggeridge*, having received that letter, on the 15th of May sent a letter to the secretary, sending him the bankers' receipt for the 600*l.*, and saying he should feel obliged by the secretary's forwarding him the interest on his shares; so that it appears that at that time he intended to take the shares. In answer to that letter the secretary sent him another copy of the articles of association for his signature. On the 10th of June,

1857, he received notice of a general meeting, which meeting was held, and a register of shareholders was signed, in which Mr. *Muggeridge's* name appeared. On the 5th of August a call of 2*l.* per share was made, and in November following another call of 2*l.*

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Mr. *Muggeridge* not having signed the memorandum of association, an action was brought against him in December to recover the calls, and during the progress of that action in April, 1858, he sent a notice to the secretary to strike his name off the list. That action resulted in a verdict for the Plaintiffs, subject to a special case; and the result of this special case was, that the Court was of opinion that the Defendant's agreement to take the shares was not an acceptance within the meaning of the Joint-Stock Companies Act, so as to enable the Plaintiffs to recover at law.

The Plaintiffs then filed their bill in this Court, and to that bill the Defendant filed this plea. It is contended that Mr. *Muggeridge* has not signed; that he is not a shareholder; and he argues on that footing that he cannot be decreed to accept the shares by signing the acceptance in writing.

By the 9th section of the Joint-Stock Companies Act, 1856 (*a*), it is enacted, that the memorandum of association may prescribe the regulations of the company, or if there be none such, or so far as any such shall not be contrary to such regulations, the regulations in schedule B to the act shall govern the company. The plea states that there is no regulation in the articles of association as to the acceptance of shares, and therefore the regulations in schedule B apply, and they

(*a*) 19 & 20 Vict. c. 47.

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provide that no person shall be a shareholder unless he shall have signed.

It is stated in the plea that neither the Defendant nor any person by him lawfully authorized did ever testify his acceptance of any shares in the said company by writing under his hand.

Now it appears to me that this is a very strange and unusual plea. The bill states that the Defendant agreed to do an act, namely, to sign the acceptance of shares, and asks that he may be decreed to perform that agreement. The defence set up by the plea is that the Defendant never did perform the act that the Plaintiffs seek to make him perform. The plea does not allege any specific fact or matter not stated by the bill—some new fact which, if proved, would entirely displace the equity of the bill; but it states a fact which is stated or assumed by the bill, and which is the very ground of the complaint made by the bill. It is just the same thing as if, to a bill filed for specific performance of an agreement to execute a lease, the Defendant should plead, “I never did execute it.” The office of a plea is “not to deny the equity, but to bring forward a fact which, if true, displaces it:” *Rowe v. Teed* (a).

That is the plea: the argument, however, was upon the equity, and was not founded on the plea. It appears to me that the plea is a miscarriage, and that it is bad, and cannot be sustained as a plea; in fact, there is nothing whatever upon which the Plaintiff can take issue. On this ground, therefore, in form, I should overrule the plea; but as the argument has gone upon the equity, I will consider whether, if the defence had been properly framed, it could be sustained.

(a) 15 Ves. 377.

The argument was divided into two parts: first, that in fact the Defendant had not entered into a valid agreement; and secondly, that if he had agreed to take the shares, the agreement was one which this Court will not order him to perform.

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1. Has the Defendant entered into a valid agreement to accept the shares? He made an application, and thereby *agreed* to take 300 shares or any less number that might be allotted to him. That is a most distinct *agreement*, and looking at the act of parliament we find the meaning of the word *acceptance* of shares. No person shall be deemed to have *accepted* shares unless he has testified his assent in writing; and what Mr. *Muggeridge* has agreed to do, is to do that which the act of parliament prescribes, namely, the signing of an acceptance of those shares in writing.

2. Is this such an agreement as the Court will decree to be specifically performed? That question was argued by the Defendant's counsel on the footing of this association being a partnership, as in a great many respects it is; and in that view I will examine the argument. The question, whether the Court will decree specific performance of this agreement, resolves itself into the question whether the Court will decree specific performance of an agreement for a partnership; and that question is only a branch of a wider question, whether the Court will grant such relief generally in respect of interests in the nature of personal chattels, or merely *personal interests*; and that also is a branch of a still wider question, on what principle will this Court decree specific performance at all?

The general principle is plain enough. The principle

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on which this Court decrees specific performance is, that the remedy at law, which can only be the giving of damages for non-performance, is not sufficient for the injury which the Plaintiff has sustained by reason of the non-completion of the contract.

In the majority of cases the Court will not decree specific performance with regard to personal chattels, because in the majority of those cases the remedy at law is sufficient. But this Court applies the same general equity to all contracts, and will decree specific performance as to chattels in those cases where the damages which might be recovered in a Court of law are not a sufficient remedy. And the Court applies the same principle where the question relates to a contract for a partnership. Ordinarily the injury which results from the breach of such a contract does not admit of an adequate remedy in damages, and therefore, as a general rule, a contract for a partnership is one which this Court would specifically enforce, just as it would enforce any other contract if damages would not be an adequate remedy.

There are, however, many cases in which specific performance of a contract for a partnership has been refused. But the ground upon which those cases have been decided is not that a contract for a partnership is in itself such a contract as a Court of Equity will not specifically enforce, but that the contract being for a partnership, without any time fixed for its duration, if the partnership were completely formed, the Defendant could at his pleasure dissolve it the next moment, so as to leave the Plaintiff in no better condition than if the partnership had never existed, and, therefore, it would be idle and nugatory to compel the formation of such a

partnership. The principle of those cases is, that this Court will not make any order in vain. It will not make an order to establish any given relation between two parties which either party has the power immediately to put an end to, and so make the order nugatory. Thus if the owner of land agrees to grant a lease of it to a tenant, this is a contract of which, upon a bill by the tenant, the Court will ordinarily decree specific performance; but if the tenant has already broken any of the covenants, so that on the very next day the landlord may put an end to the lease, the Court will refuse specific performance. And on this same principle the Court acts with respect to a contract for partnership when no time is fixed for its duration. In such cases as either party may dissolve it the next moment, so that the parties would be just in the same condition as before, the order would be nugatory. In the case of *Hercy v. Birch* (a), Lord *Eldon* said, "No one ever heard of this Court executing an agreement for a partnership when the parties might dissolve immediately afterwards." Mr. *Muggeridge* says that that is just the case here; for he contends that the Plaintiffs are asking for the specific performance of an agreement for a partnership which the next moment he may put an end to.

Now I entirely accede to the proposition that if the Defendant, having signed an acceptance in writing of the 250 shares, and having thus become a shareholder of the company, could then immediately retire from the company and leave the parties in the same condition as if he had never been a shareholder, so that the Plaintiffs would have received no benefit from his having taken shares, this Court would not enforce the contract. But supposing he has signed the written acceptance of the

(a) 9 Ves. 357.

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shares, what does he mean by saying that he could retire at any moment, at his pleasure? He could not by retiring put an end to his shares. He must either retain the shares or find some other person to become a shareholder in respect of his shares. Assuming that he may transfer them without the leave of the company, still the company get the benefit of the shares being held either by the Defendant or by his transferee. The effect of decreeing him to perform his agreement would be that the company would obtain the benefit of having some one liable to it for calls on so many shares, and that is a benefit of which it is not in the power of the Defendant to deprive the company by retiring from the concern. The fallacy of the Defendant's argument is, that he calls a joint stock company a *partnership*, and assumes, because in an ordinary partnership, where no term is fixed for its duration, any partner may put an end to the whole business at once, and so retire from it, that therefore the shareholders in a joint stock company are in the same position, forgetting that it is precisely in this very respect that a joint stock company differs from an ordinary partnership. A shareholder in a joint stock company cannot, as an ordinary partner may do where no term of partnership is fixed, dissolve the partnership and put an end to it; he can only retire from it by transferring his shares to some other person who shall stand as a partner in his place. Therefore to make a decree enforcing the contract to accept shares would not be to make a nugatory decree, and the principle on which the Defendant relies does not apply to this case; for that principle is founded on the supposition that the Plaintiffs would derive no benefit from a decree for specific performance.

I should have felt no difficulty in this case but for the

decision of the Master of the Rolls in the case of *The Sheffield Gas Consumers Company v. Harrison* (a), in which case the Master of the Rolls dismissed a bill seeking specific performance of a similar contract, on the ground that a decree for specific performance would have been nugatory. I need hardly say that it is not without great hesitation that I differ from that decision, but I am unable to agree with it. It does not appear to me that such a decree would be nugatory.

[His Honor referred to the language of the Court in that case and proceeded :]—

But I would venture to submit that there is this great difference between a joint stock company and an ordinary partnership; that in an ordinary partnership, where no term for the partnership is fixed, either party may put an end to it at any time; while in a joint stock company a shareholder cannot dissolve the partnership. He may retire from the company, but he can only do so by transferring his shares to some other person, and so that other person takes precisely the same shares; the only effect being, that the shares which before the transfer were held by *A.* are now held by *B.*, and it is on this point that I found my judgment that a decree for specific performance in this case will not be nugatory.

The plea was overruled.

(a) 17 Beav. 294.

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Costs.
Decree, Form of.
Set-off.
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Wife.

WRIGHT v. CHARD.

Where a bill was dismissed with costs as against a husband and wife, so far as it sought to charge the wife's separate estate, and the husband was ordered to make certain payments to the Plaintiff in respect of another demand in the same suit:—

Held, that the costs of so dismissing the bill as against the husband and wife were payable by the Plaintiff to the husband alone; and also that the Plaintiff was entitled to set off these costs against the amounts so ordered to be paid by the husband to him.

THIS case now came on to be spoken to on the minutes of the decree.

By the decree on the 22nd of November, 1859 (*a*), the bill was ordered to be dismissed as against the Defendants *Leicester Vernon* and *Emily* his wife, so far as it sought to charge the separate estate of the Defendant *Emily Vernon*; and the Defendant *Leicester Vernon* was ordered to pay an occupation rent in respect of certain premises occupied by him during the lifetime of *Atherton Watson* from October, 1849, to May, 1851.

The minutes of decree carried in by the Plaintiff and issued by the Registrar were drawn on the footing of setting off the costs payable by the Plaintiff in respect of dismissing the bill so far as regards the separate estate of Mrs. *Vernon*, against the occupation rent payable to the Plaintiff by Mr. *Vernon*.

It appeared that Mrs. *Vernon* had not obtained an order to answer separately from her husband, but, on the contrary, that Mr. and Mrs. *Vernon* had answered and defended the suit jointly.

Mr. *J. Sidney Smith*, on behalf of Mr. and Mrs. *Vernon*, now contended, that so much of the suit as was dismissed related exclusively to Mrs. *Vernon's*

(*a*) Reported *ante*, p. 673.

separate estate ; that according to the decisions of the Court, the separate property of a married woman was liable to her contracts and to her solicitor's costs in respect of proceedings concerning her separate estate ; and that the costs ought to be ordered either to be paid to the wife on her separate receipt, or to the husband in right of the wife ; and that as the costs and the claim for compensation against the husband were in different rights, there could be no set-off.

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The VICE-CHANCELLOR.

This is a case in which a solicitor has been employed on behalf of a husband and wife in respect of the wife's separate estate. It is clear that, in the absence of any special contract, the husband is liable to the solicitor.

The question here is, whether money which Mr. *Vernon* has been ordered to pay to the Plaintiff in respect of another demand in the suit shall be set-off against costs which the Plaintiff is liable to pay in respect of the costs of Mr. and Mrs. *Vernon*. If those costs are to be paid to Mr. *Vernon*, there can be no doubt as to the Plaintiff's right to a set-off.

The costs which the Plaintiff has been ordered to pay are the costs of dismissing the bill, *quoad* the attempt to charge the separate estate of Mrs. *Vernon*, and the question is, whether they are to be paid on the receipt of Mr. and Mrs. *Vernon* jointly, or of Mr. *Vernon* alone. Under the old practice, the usual form of dismissing a bill was merely to dismiss it with costs as against *A. B.* The costs were taxed, and the Defendant was left to obtain them from the Plaintiff ; but now under the new practice, in order to found the process of

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fi. fa. thereon, it is usual to introduce into the decree, where a bill is dismissed as against a certain Defendant, a direction that the costs be taxed and paid by the Plaintiff to that Defendant. In carrying out that form of decree in such a case as the present, a question arises whether the costs shall be paid to the husband alone or to the husband and wife together? I think they must be paid to the husband alone; and inasmuch as when payable to the husband and wife jointly, they belong to the husband, *a fortiori* when payable to the husband alone such payment will be sufficient. The effect of the decree will be to make the costs ordered to be paid by the Plaintiff payable to Mr. *Vernon*; and there will be a set-off of the sum to be paid by Mr. *Vernon* to the Plaintiff for occupation rent.

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Debtor and
Creditor.
Deed.
Construction.

KINGSFORD v. SWINFORD.

IN this case the bill stated that up to the 19th November, 1855, the Plaintiff and *James Smith Swinford*, the son of the Defendant, carried on business in partnership as chemical manufacturers and merchants, under the firm of "*Kingsford & Swinford*."

That by an indenture dated the 19th November, 1855, between the Plaintiff of the first part, the said *J. S. Swinford* of the second part, and the Defendant of the third part, reciting the partnership, and reciting that the Plaintiff and *J. S. Swinford*, as such partners, were indebted to the Defendant in 4,279*l.* 17*s.* 5*d.*, which he had agreed to receive in the manner thereafter mentioned; and reciting that it had been agreed that the co-partnership should be immediately dissolved, and that an accurate valuation of the assets of the partnership being expressly waived, *J. S. Swinford* should assign and release to the Plaintiff all the property of the partner-

A deed of inspectorship contained many clauses referring to a division and winding up of the debtor's estate as if he had become bankrupt, but some clauses were not quite consistent with that intention:—*Held*, on the general construction, that the intention was to deal with the matter as if in bankruptcy.

A deed of inspectorship recited that it had been resolved to prepare such

a deed for winding up the estate of the debtor according to the rules in bankruptcy, and declared that the surplus monies should, after payment of costs and expenses, be divided among creditors as if the debtor had become bankrupt; and generally, that the assets should be distributable, and the rights and equities between the creditors and between the creditors and the debtors be the same, as if the debtor had been made bankrupt.

It provided also that nothing in the deed should prevent the parties to it from having the benefit of any mortgages, claims, charges or liens on any estate.

A creditor who held a policy proved for and received dividends on his whole debt and retained his policy.

Held, that he was not entitled to do so, and that he could not be allowed to sue the debtor for breach of covenant in not paying further premiums: the construction of the deed showing on the whole the intention of the parties that they were to deal with each other as if the matter were in bankruptcy.

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ship, and that the Plaintiff should take on himself all the debts and liabilities of the firm, and provide for the debt due to the Defendant in manner thereafter mentioned; and reciting, that in pursuance of the agreement the Plaintiff had that day, in order to secure to *J. S. Swinford* the payment of 2,414*l.* 15*s.* 10*d.*, given to the Defendant eight promissory notes made by the Plaintiff, and dated the 1st of November, 1855, and also a bill of exchange dated the 1st of November, 1855, drawn by the Plaintiff on and accepted by Messrs. *Hoile, Barnes & Co.* for 320*l.*, making in the whole the said sum of 2,014*l.* 15*s.* 10*d.*, it was witnessed, that the Plaintiff and *J. S. Swinford* thereby determined and dissolved the partnership. And *J. S. Swinford* thereby assigned to the Plaintiff his share of the credits of the partnership (the other assets thereof having been assigned to the Plaintiff by other deeds of even date), and the Plaintiff covenanted with the said *J. S. Swinford* to discharge all the partnership debts and to indemnify him and his estate against them. The Plaintiff covenanted to pay the nine several promissory notes and bill of exchange, making in the whole the sum of 2,414*l.* 15*s.* 10*d.*, and also that he would on or before the 6th of October, 1857, pay to the Defendant the full sum of 1,865*l.* 1*s.* 7*d.*, being the balance of the said debt of 4,279*l.* 17*s.* 5*d.*, unless therefrom released under the covenant thereafter contained on the part of the Defendant, together with interest. And the Defendant covenanted that if punctual payment was made he should not sue for or demand the debt, except as thereinbefore stipulated. And the Defendant with the consent of the Plaintiff released *J. S. Swinford*, his heirs, executors and administrators, from the debt of 4,279*l.* 17*s.* 5*d.*

That by a memorandum of agreement dated the 5th

of January, 1856, made between the Plaintiff of the one part and the Defendant of the other part, after reciting the last-stated indenture and the deposit by the Plaintiff with the Defendant of the notes and bill therein mentioned; and reciting, that on the execution of the said deed it had been agreed, that in consideration of 20*l.* to be paid by the Defendant to the Plaintiff, the Plaintiff should deposit policies of assurance with the Defendant to secure payment of the said promissory notes and bill of exchange; it was witnessed, that the Plaintiff had that day deposited with the Defendant a policy in the *Scottish Amicable Life Assurance Society*, numbered 7079, dated the 28th day of December, 1855, for 2,000*l.*, to be held by the Defendant as security for the due payment of such promissory notes and bill of exchange. And the Plaintiff agreed with the Defendant that he would when required execute to the Defendant a good and valid mortgage of the policy containing powers of sale and all other usual and proper clauses and provisions. That he would, till the whole of the said promissory notes and bill of exchange were duly paid and satisfied, *pay the annual premium* on the said policy when the same should become due and payable, and would on demand produce the receipts to the Defendant, his executors, administrators or assigns. That if the Plaintiff should fail or neglect to pay such annual premiums, it should be lawful for the Defendant to pay the same and to hold the said policy as security for the payment thereof, his interest and costs. And it was further agreed, that during the life of the Plaintiff, and till default should be made in payment of some annual premium or of one or more of the said promissory notes or bills of exchange, the Defendant should not give notice to the said insurance society of

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the assignment or deposit of the said policy of assurance. At the same time the Plaintiff deposited with the Defendant the policy described in the memorandum.

That no notice of the assignment or deposit was ever given to the company.

That after the dissolution of partnership between the Plaintiff and *J. S. Swinford*, the Plaintiff continued to carry on the business of a chemical manufacturer and merchant until his suspension of payment afterwards mentioned.

That the Plaintiff duly paid to the Defendant the first promissory note, and subsequently and before the 18th of August, 1856, paid to the Defendant further sums in respect of such notes, making the entire sum paid in respect of the debt to the Defendant the sum of 1,087*l.* 17*s.* 7*d.*, but the Plaintiff did not pay any other of the promissory notes.

That shortly before the 18th of August, 1856, the Plaintiff suspended his payments, and an indenture, dated the 29th of August, 1856, and made between the Plaintiff of the first part, *Alexander George Gray*, *Charles Crews* and *George William Speth* of the second part, and the several persons and firms whose names were thereunto subscribed, and whose seals or the seals of some members of whose firms were thereunto affixed, being respectively creditors of the Plaintiff, of the third part, was duly executed by the Plaintiff and by the parties of the second part, and also by very numerous other persons, being in fact all the creditors of *Courtenay Kingsford*, and amongst them by the Defendant. The

deed recited that the Plaintiff was indebted, on account of the business carried on by him under the aforesaid firm, to the several persons parties thereto of the third part in various debts or sums of money, some of which were secured by bills of exchange or other securities which would speedily become due, and which said debts or sums of money the Plaintiff was not then able to pay in full; and that, the Plaintiff having suspended his payments, a meeting of his creditors was held on the 18th of August, 1856, at which meeting a statement of the Plaintiff's affairs was submitted, and thereupon it was unanimously resolved by the creditors present, that it was expedient that the Plaintiff's affairs should be wound up under inspection, and that the parties of the second part should be inspectors for that purpose; and it was resolved that a proper deed of inspection, *providing for the winding-up, administration and distribution of the Plaintiff's estate, according to the rules in bankruptcy*, should be prepared and approved of by the inspectors, and that a dividend should be paid as early as possible upon such deed being executed, and further dividends from time to time; and it was further resolved, that no creditor signing or assenting to the said resolutions should be in any way prejudiced with respect to his rights and remedies against third persons, or with respect to any security or lien he might have for his particular debt, and such signature or assent should be subject to the consent of such third persons where any consent was necessary; and that, pursuant to such resolutions, the now stating indenture had been prepared, settled and approved on behalf as well of the inspectors as of the Plaintiff and of the creditors, for the purpose of regulating the realization and final liquidation of the Plaintiff's affairs as thereafter provided. It was then

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witnessed, that in pursuance of the said resolutions, &c., the Plaintiff covenanted with the inspectors that he would, to the best of his ability and power, during the continuance of that arrangement, manage, transact and conduct to a conclusion the liquidation of his affairs and estate for the benefit of his creditors, and for that purpose use his best endeavours to realize his real and personal estate, and do all acts necessary for those purposes; and, further, that in so doing he would attend to, observe and act on such directions as the inspectors or inspector should give; and, further, should and would, subject to such directions and the provisions thereafter contained, administer his said estate and effects in manner thereafter provided. The material clauses were the following:—Sixth. That the surplus monies to arise from the estate and assets of the Plaintiff should from time to time, after payment of costs and expenses thereby authorized, be divided amongst and paid to the said creditors *according to the rules of division applicable in case of bankruptcy, as if the Plaintiff had become bankrupt on the said 18th day of August, 1856*; and creditors or persons who would be entitled to prove in such bankruptcy should be deemed creditors for the amounts they would be entitled to prove; and the creditors should have the same rights respectively as to the set-off, mutual credit, lien and priority, and the monies to arise from the estate and assets of the Plaintiff should be distributed amongst the creditors in like manner as the same would be distributed in bankruptcy. Ninth. That all and every the money, bills, notes and securities belonging to or which should be received or arise from or in respect of the said estate or business, and the liquidation thereof, should be held and paid and applied for the purposes thereafter

directed concerning the same. Then followed directions as to application of the monies, with the following proviso:—Provided always, and it was thereby declared and agreed by and between the parties thereto, that, notwithstanding the trusts or directions therein aforesaid, it should and might be lawful to and for the Plaintiff, with the sanction of the said inspectors or either of them, out of the monies which should be subject to the said directions, to pay and discharge in full such debts or salaries as were or would be payable in full *if the estate were being administered in the Court of Bankruptcy*. Tenth. The first dividend out of the monies arising from the estate and effects should be paid unto the creditors, their executors, administrators and assigns, forthwith, so far as such monies had been realized, and dividends should afterwards from time to time be made amongst the creditors, and their respective executors, administrators and assigns, as often as the said inspectors should think fit. Eleventh. *And, generally, it was the express agreement and understanding of all the said parties to the now stating indenture, that the said money and assets should be distributable to and amongst all such of the creditors of the Plaintiff, in such and the same manner as the same would be payable and distributable, and the same rights and equities should prevail and govern any disputes and questions amongst the said creditors in relation to their said debts, and between the said creditors and the Plaintiff, as if an adjudication in bankruptcy had been made against the Plaintiff on the said 18th day of August, 1856, and that any application of the said monies and assets in the now stating indenture specially directed to be made, which might not be exactly in accordance with the rules in bankruptcy if such adjudication had been made as aforesaid, should be*

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deemed to be qualified, altered or controlled by the now stating provision. Thirteenth. That it should be lawful to and for the Plaintiff, with the sanction of the inspectors or inspector for the time being, out of the monies arising from his said estate, to pay any person or persons having any lien or liens or other securities or security on any part of the said estate, the full amount of the money due to him, her or them, and for which he, she or they should have any such liens or lien, securities or security, for the purpose of getting possession of the estate whereon the same might subsist discharged therefrom, so as that the monies so to be paid do not in the estimation of the inspectors or inspector exceed the value of the estate subject to such lien or security, and to keep down the interest due or to become due on such liens or securities, and also, for the better preserving the benefit of any such estate, to borrow money for the purpose of paying off any such liens or securities, and to secure the repayment of the money borrowed with interest by transfers of any such liens or securities paid by means of the money so borrowed, or by creating new or further liens thereon. Fourteenth. All debts and sums of money owing by the Plaintiff, or for which he or his heirs, executors or administrators' estate or effects was or were or might be liable, and which were or should or might be payable at any then future time or times, or on any event ascertained or not then ascertained, or on any contingency, and which would be the subject of valuation in the case of bankruptcy, might be valued and the value thereof determined either by reference to any actuary or accountant, or by arbitration in the usual way, as the inspectors or inspector for the time being might think fit; and the sum which should be determined as the immediate value of any such future or contingent debt or liability to be

determined as therein aforesaid should be determined as the sum actually due and owing to the creditor, who should be paid dividends in respect of such immediate value in satisfaction of such future or contingent debt. Fifteenth. All creditors of the said Plaintiff who should hold any bill or bills of exchange, promissory note or notes, upon which any other person or persons should be liable for the payment of the money thereby secured, should be considered as executing the now stating indenture conditionally, and should not directly or indirectly be bound or concluded by their respectively executing the same, unless and until such third party or parties should assent to the now stating indenture or the arrangement thereby made, the same being signed by such creditors respectively, without prejudice to the rights and remedies of the creditors so conditionally signing against such party or persons respectively; but such conditional signature should be construed as merely expressing the assent of the last-mentioned creditors to be parties to the now stating indenture, when they should have obtained the assent of such third party or parties as therein aforesaid to the execution thereof by such creditor or creditors respectively, without prejudice to his or their rights or remedies against any person or persons other than against the Plaintiff, his executors or administrators; and dividends should be retained for creditors so conditionally signing, to be paid as soon as such assent should be obtained. "Twenty-seventh. Provided always, and it is hereby agreed and declared between and by the parties to these presents, that nothing herein contained shall extend to prevent the said creditors parties hereto, or any of them, or their or any of their respective partner or partners, or their or any of their respective heirs, executors, administrators or assigns, from enforcing or otherwise obtaining the

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full benefit and advantage of any mortgage, claim, charge or lien which they, or any of them, now have or hath upon any estate or effects whatsoever, or from suing, prosecuting or otherwise proceeding against any person or persons other than or together with the said *Courtenay Kingsford*, his heirs, executors or administrators, who is, are, shall or may be liable to or accountable for the payment or making good to any of the creditors of all or any part of their respective debts, either as drawers, indorsers or acceptors of any bill or bills of exchange or promissory note or notes, or as being jointly or separately bound in any bond or bonds, obligation or obligations or other instrument or instruments, or as being liable or accountable for the payment of any such debt or debts, without having subscribed any bill, bond or other instrument whatsoever or otherwise howsoever, as if these presents had never been made, and for conformity's sake, but for conformity's sake alone, the said parties hereto of the first part, or either of them, their or either of their heirs, executors or administrators, may be joined in any such proceeding as last aforesaid." "Twenty-eighth. Provided lastly, and it is hereby agreed and declared, that it shall be lawful for any creditors of the said *Courtenay Kingsford*, holders of bills or notes drawn, accepted or indorsed by him, and on which any other person or persons are also liable, either as drawers, acceptors or indorsers thereof, notwithstanding they shall have executed these presents as creditors in respect of the said bills and notes, to abandon all claim in respect thereof against the estate of the said *Courtenay Kingsford*, and to resort to the estate of such other person or persons, provided that such creditors shall not have received any dividend under these presents, or having received any such dividend shall refund the same.

A marginal note was attached to each clause, and, in fact, formed part of the deed when executed. The note annexed to the twenty-seventh clause was as follows :—
 “These presents not to prejudice claims of creditors on third parties.”

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That immediately after the execution of the deed of inspectorship, the Plaintiff began winding up his affairs in conformity with the terms of it, and under the direction of the inspectors named in it, and he duly performed everything which the deed made it incumbent on him to perform.

That in the month of November, 1856, the inspectors declared a dividend of two shillings in the pound on all the debts proved under the deed; and in the month of March, 1857, they declared a second dividend of one shilling in the pound on all the debts so proved, and such two dividends were duly paid. A third and last dividend of two pence half-penny in the pound was declared in the month of December, 1858, and was in course of payment. The inspectors, having realized everything of any value which formed part of the estate, in the month of July, 1858, transferred the residue (which had in effect no pecuniary value whatever) to the Plaintiff for the sum of 10*l.*, which the Plaintiff duly paid.

That the Defendant proved under the inspectorship deed as a creditor for 3,191*l.* 2*s.* 5*d.*, which sum was the full amount of the debt of 4,279*l.* due to him from the Plaintiff when the first stated deed was executed, less only the sum of 1,087*l.* 17*s.* 7*d.* paid to him by the Plaintiff as before mentioned, before the Plaintiff suspended payment, and he received the two first dividends

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on that amount. The Defendant on neither occasion produced or adverted to the agreement of the 5th of January, 1856. Whether he had actually received the third dividend did not appear, but he might have received the same whenever he chose to do so. The circular letter of the accountants employed by the inspectors, by which the payment of each dividend was announced, required the creditor on applying for payment to bring with him all securities which he might have received from the Plaintiff.

That in the month of December, 1856, the Plaintiff, acting under the impression that the debt was cancelled by the Defendant's execution of the inspectorship deed and the receipt by him of the dividend upon his said debt and the security consequently satisfied, directed his solicitors to obtain the policy from the Defendant's solicitors, with the intention on the Plaintiff's part of keeping it on foot for the benefit of his own family. In consequence of this, the Plaintiff's solicitor had on the 30th of December, 1856, an interview with the Defendant's solicitor, at which it appeared to have been assumed by both parties, that the Plaintiff was no longer liable in anyway to keep the policy on foot; but the Defendant's solicitor conceived his client was entitled to the value of the policy, if it was worth anything; and it was ultimately arranged that the Plaintiff's solicitor should have the policy, on his undertaking either to return it or to pay the office surrender value of it. In the course of the same day the policy was delivered to the clerk of the Plaintiff's solicitor, who, not distinctly understanding what had taken place, gave without authority an undertaking to return it on demand. At this time the premium which had become due on the 28th of December, 1855, was unpaid.

Shortly afterwards, Plaintiff's solicitor inquired at the office as to the surrender value of the policy, and was informed in writing by the secretary that no value could be allowed for it, as less than three premiums had been paid. In the middle of the month of January, 1857, he, at the Plaintiff's request, handed over to the Plaintiff the policy which had then either lapsed, or was on the verge of lapsing, and which the Plaintiff had after some consideration determined not to keep on foot. Afterwards and some time after the policy had lapsed, the Plaintiff effected a new policy with the same office, an allowance of 15*l.* being made to him on effecting the new policy, on the ground of the former one having been allowed to lapse. The Plaintiff had since allowed the new policy so effected by him to lapse also. The Plaintiff, when he effected the second policy, gave up to the office the instrument creating the former one.

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That the Plaintiff gave up this instrument *bonâ fide* and without any idea that he was doing anything which the Defendant could complain of. However, in the month of May, 1858, the Plaintiff's solicitors received from the Defendant's solicitors a letter demanding the policy on the ground of the undertaking to return it entered into by their clerk, and some correspondence and discussion arose between the firms. However, the policy not being in the power of the Plaintiff, all the former could do was to offer to pay to the solicitors of the Defendant the sum of 5*l.*, which was greatly more than the value of it, but such offer was refused. The letter of May, 1858, was the first application of the Defendant's solicitors for the return of the policy, or otherwise with respect to it, after the 30th of December, 1856.

That in the latter part of such correspondence and

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discussion, and in or about the month of December, 1858, the Defendant's solicitors for the first time advanced on the part of the Defendant the contention that the Plaintiff was still liable on the agreement to pay the premiums on the said policy, notwithstanding all that had passed, and especially the proof and receipt of dividends by the Defendant hereinbefore mentioned. The claim of the Defendant's solicitors was of course not entertained by the Plaintiff's solicitors, and eventually on or about the 7th of January, 1859, the Defendant *J. Swinford* commenced an action against the Plaintiff in her Majesty's Court of Queen's Bench at *Westminster*, to which action the Plaintiff duly appeared on the 15th of January.

That by the declaration in the said action delivered on the 20th of January, 1859, the Plaintiff, after stating the said agreement of the 5th of January, 1856, alleged a breach of that agreement on the part of the present Plaintiff (the Defendant at law) in neglecting and refusing to pay the annual premiums on the policy which became due before the commencement of the action; and further alleged, that after the making of the agreement, and contrary thereto, the present Plaintiff, wrongfully and without the knowledge or consent of the Plaintiff at law and against his will, surrendered the policy to the grantors thereof, who had no notice of the premises, and that by means of the aforesaid several premises the policy was lapsed, and that the Plaintiff at law had lost the benefit that would otherwise have accrued to him from the policy, and was otherwise damnified. And by a second count of the said declaration, the Plaintiff at law sued the Defendant at law for having converted to his own use and wrongfully deprived the Plaintiff at law of the use and possession of

the Plaintiff's goods, that is, the before mentioned policy. And the Plaintiff at law claimed 2,000*l*.

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The bill prayed that the action, or any other action, might be restrained by perpetual injunction.

Mr. *Baily* and Mr. *Wickens* for the Plaintiff.

The question is, is there any liability on the part of the Plaintiff to go on paying premiums? The rights of the parties are by the deed to be regulated as in bankruptcy. If in bankruptcy the acts had been done that have been in fact done, that would be complete payment, and the only real question is, whether on the construction of this deed the rights of the parties are intended and contracted to be the same as in bankruptcy. The whole scope of the deed shows that intention, and clause 6 notices it; the provision in clause 9 points at an administration as in bankruptcy; and the 11th is precise and as strong as any thing can be. Besides, when the dividends were paid, the creditors were called upon to come in and bring their securities. The Defendant brought the notes, but not the policy. He cannot, therefore, any longer rely on that security. [They cited *Ex parte Hornby*(a); *Ex parte Solomons*(b); *Ex parte Egginton*(c); *Elder v. Beaumont*(d).]

Mr. *Glasse* and Mr. *H. Stevens* for the Defendant.

The Defendant executed this deed on the faith that he should have the benefit of his security. The 11th clause of the deed only applies to the application of the monies to be collected under the deed. The debt on this security could not be proved in bankruptcy, and the deed provides that only debts provable in bank-

(a) Buck. 351.

(b) 1 Gl. & J. 25.

(c) Mont. 72.

(d) 8 El. & Bl. 353.

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ruptcy shall be proved under it. [They cited *Warburg v. Tucker* (a) and sect. 177 of Bankruptcy Act.]

The VICE-CHANCELLOR (after stating the facts of the case and the clauses in the deed above stated, proceeded:)—

This deed was signed by the Plaintiff, the inspectors and various creditors, and among them the Defendant *Swinford*, who received dividends upon the whole of his debt which remained unpaid; and under this deed the Plaintiff proceeded, under the direction of the inspectors, to wind up his affairs, and assets were realized out of which dividends were paid to the creditors. The Defendant *Swinford* received two dividends. Some time afterwards, the policy of assurance having been allowed to remain in the hands of the Defendant, the Plaintiff applied for it, considering that he was entitled to the benefit of it. Various communications passed between the solicitors of the Plaintiff and the Defendant, which resulted in the policy being given up by a clerk of the Defendant's solicitor to the Plaintiff's solicitor, on receiving an undertaking from the Plaintiff's solicitor to return it. At the time the deed of inspection was executed only one premium had been paid on the policy. The Plaintiff determined not to keep the policy on foot, and effected a new policy, the office allowing him a small sum of money towards it on the old policy. The Defendant brought an action against the Plaintiff to recover the damages sustained by reason of his not performing his covenant contained in the agreement of the 5th of January, 1856, to keep up the policy, and

(a) 5 El. & Bl. 384.

also brought an action against the Plaintiff's attorney, upon his undertaking to return the policy. The question I have to consider is, whether the Defendant at law is entitled to an injunction to restrain that action; and that turns upon the construction of the deed of inspection.

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It appears to me that it was clearly the intention of all the parties to that deed, that all matters both as between the Plaintiff and the creditors, and between the several creditors, should be conducted and settled exactly as if there had been an actual adjudication in bankruptcy. That intention is clear from the language of the deed, and so clearly in the 11th section of the deed, that there is a provision that if there should be any specific directions in the deed which would militate against the principles of the Court of Bankruptcy, that such directions should be modified so as to make them agree with those principles. The principle in bankruptcy as between creditors is that all shall take *pari passu*, and that a creditor who holds security must take his choice, either to avail himself of his security and not to come on the other assets, except for the balance of the debt after realizing the security, or else to come and prove for the whole debt, and give up the particular security for the benefit of the general body of creditors.

The Defendant therefore was entitled, at his option, to prove for the whole of his debt. Having a security which was of no value, he made his election to prove for the whole debt, and having done this, his security, had it been of any value, would have been the property of the other creditors.

It has however been contended that, so far as relates

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to securities, the principles of bankruptcy should not apply, by reason of the recital that it had been resolved that no creditor signing or assenting to the resolution should be in any way prejudiced as to his rights and remedies against third persons, or with respect to any security or lien for his particular debt, and also by reason that the 27th and 28th clauses provide—[His Honor referred to those clauses, see *ante*, pp. 713, 714.]

The question is whether these clauses are to prevail against the other parts of the deed, which declare that the inspection should be according to the rules in bankruptcy. The language of the deed appears to me to have no such meaning. Had that been the intention, the language of the deed would have been different; it would have been that, notwithstanding that the rules in bankruptcy were to prevail, the intention was that those rules should not apply with respect to securities, and that any creditor holding security might prove for the whole of his debt and still hold his security. The absence of any such language goes a long way to contradict the Defendant's contention. But the effect of the clauses in the deed is that a creditor is not to be prevented from enforcing his security by reason of his executing the deed, and not that he is to prove for his debt under the deed and keep his security. These clauses do not seem to me to apply.

I think, therefore, that the Plaintiff is entitled to a perpetual injunction.

With regard to the question of costs; having regard to the conduct of the parties, the injunction must be granted without costs. *

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THE PRINCIPAL MATTERS.

ACKNOWLEDGMENT.

The acknowledgment provided for by the 5th section of the 3 & 4 Will. 4, c. 42, in order to take a specialty debt out of the operation of that statute, need not be made by the person chargeable to the person entitled or amount to a promise to pay. Held, therefore, that an admission of a bond debt, contained in the answer of the executors of the obligor in a suit to which the obligee was not a party, was sufficient to take the bond debt out of the operation of that statute. A residuary legatee may set up the Statute of Limitations as against creditors in an administration suit, though the executors do not take the objection. [*Moodie v. Bannister*] 432

ACT OF PARLIAMENT.

The Lands Clauses Consolidation Act, sect. 80, contemplates not one application in respect of several re-investments, but several applications: where it was shown to

be "for the benefit of the parties," the Court ordered a company to pay the costs of a third re-investment in a very small purchase. [*The Trustees of St. Bartholomew's Hospital*] 425

ACTS OF PARLIAMENT.

A vestry meeting in which a portion of the parishioners is excluded is a meeting in the nature of an open vestry meeting within the 19 & 20 Vict. c. 112, s. 3. But the election of persons to derive benefit under a charity creating almshouses is not a "duty, power or privilege" within the meaning of that clause of the act. [*Attorney-General v. Drapers' Company*] 299

ADMINISTRATION.

1. In the administration of a mixed estate, real and personal, where, owing to peculiar circumstances, considerable time has elapsed before the personal estate can be realised, and in the meantime interest runs upon debts and has

been paid out of the income of the tenant for life of the real estate, the Court will investigate the application of the personal estate, so as to determine the equities between the tenant for life and the remainderman. [*Shore v. Shore*]

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2. On the death of an intestate no next of kin appeared. The Crown nominated the Crown solicitor to take out administration; the administrator held the fund, paid all outgoing, and, after a certain time, handed over the fund to the king's proctor for the use of his majesty; afterwards the Plaintiffs established their title. Held, that the Crown must restore the fund, with interest, the interest to be computed from the time when all payments on the part of the estate had been made. [*Edgar v. Reynolds*] 269

AFFIDAVIT OF NO SETTLEMENT.

Upon a petition by a widow for payment out of Court of money, to the payment of which she has become entitled since the death of her husband, the Court requires an affidavit that no settlement was made on her marriage with her late husband. [*Elrington v. Elrington*] 545

AGREEMENT.

A bill alleged, in par. 2, that on the marriage of the Plaintiff with the daughter of *R. C. Young* no portion was given by *Young* to his daughter, but that previously to, and as an inducement to the marriage, *Young* represented to Plaintiff and promised and contracted with him that he, *Young*, would at his death leave to his daughter an equal share with his other children,

and the marriage took place on the faith of that promise. In par. 7 it alleged that Plaintiff, on the issuing of a certain commission of lunacy by *Young* against Plaintiff, filed an affidavit containing these words: "I say I believe that the said *R. C. Young* is not a man of considerable property, because, on my marriage, with his daughter, he confessed his inability to give or provide her any marriage portion," and that in reply *Young* filed another, stating thus: "The statement contained in the affidavit of the said *G. Barkworth*" (the Plaintiff) "that his reason for believing me not to be a man of considerable property is, that on his marriage with my daughter I confessed to him my inability to provide any marriage portion, is not correct; according to the best of my recollection and belief, the words I made use of on that occasion were, 'There will be no money for you now, but at my death she (meaning my late daughter *Mrs. Barkworth*) shall share with the rest of my children.'" *Young* died in 1855, surviving *Mrs. Barkworth*, having given away his property by will, and not having, by his will or otherwise, made any provision for *Mrs. Barkworth* or her children. Held, on demurrer:—1. That the Statute of Frauds may be set up by demurrer. 2. That the allegation in par. 1 was only of a verbal agreement. 3. That the allegation of the statement by affidavit in par. 7 was an allegation of a sufficient note or memorandum in writing of the verbal agreement. 4. That such a memorandum, though written after the marriage, was sufficient. 5. That the agreement might have been performed in two ways: by *Young*

making a provision by will for his daughter, or by dying intestate; and that though he was precluded by his daughter's death from performing it in the first way, he was not thereby exonerated from making a provision in the way still open to him, of dying intestate: and therefore the Plaintiff's bill, praying for an equal share of the testator's residuary estate, was not on that ground demurrable. But held, that the representatives of the deceased daughter ought to have been parties. [*Barkworth v. Young*] 1

ANNUITIES.

By a will a sum of stock was given to trustees, out of the dividends to pay annuities to A., B. and C. for their lives, and after their deaths to pay the annuities to E., F. and G., without saying for life or otherwise, and after the death of survivor of E. F. and G. to pay the stock to H. Held, that the annuities were to endure till the death of the survivor, and the representative of a deceased annuitant was entitled till the death of the surviving annuitant. [*Big-nold v. Giles*] 343

APPOINTMENT.

1. A. was sole legatee and executor of the testator's personal estate and tenant for life of his real estate, with remainder to his son. At the death of the testator, he was largely indebted, and his personal estate was outstanding, owing, as to the greater part, to his having advanced large sums to a bank, of which his son was a partner, and which failed and became bankrupt. For a long period, about eleven years, the tenant for life kept down the interest of the debts out

of his life estate, which was wholly or nearly absorbed by such payment. Ultimately, enough personalty was got in to pay a large portion of the debts, and was so applied, and then the real estate was sold. Held, that no portion of the money representing the corpus of the real estate could be applied in recouping the tenant for life the interest he had paid. A receiver had been appointed both of the real and personal estate. Held, that the tenant for life must bear the receiver's poundage. [*Shore v. Shore*] . . 501

2. Where the donee exercises a power of appointment in favor of one of several objects of the power, with a view to the benefit of a stranger, the appointment is fraudulent and void, even although the appointee is ignorant of the fraud and the motive of the donee is not morally wrong. Therefore, where a married woman having a power to appoint a fund, of which she received the income for her life, among her children, appointed the whole fund at her death to her eldest daughter, in order that thereout the daughter should benefit her father, but the daughter was not informed of the mother's intention until after her mother's death:—Held, that such appointment was void. [*In re Marsden's Trust*] 594

ASSIGNEE.

1. There is no positive rule that a trustee cannot buy from his *cestui que trust*; nor that an assignee in bankruptcy may not buy from a creditor his dividends. But where an assignee bought from a creditor, not in his own name, but in the name of a stranger, and it was not clear that the creditor

knew he was selling to the assignee, the Court directed further enquiry. [*Pooley v. Quilter*] 184

2. Although, as a general rule, notice to one of several trustees is a notice to all, yet where one of such trustees was also a beneficiary, and assigned his beneficial interest in the trust fund to a stranger: Held, that the notice acquired by such trustee, as assignor, did not constitute notice to the trustees, so as to prevail over subsequent incumbrancers, it being the interest of such trustee, as assignor, to conceal the assignment; but that where such trustee assigned his beneficial interest to one of his co-trustees, the notice which that co-trustee acquired, as assignee, constituted during his life notice to the trustees, it not being his interest, as assignee, to conceal the assignment, and therefore that it prevailed over subsequent incumbrancers with notice. [*Browne v. Savage*] 635

ASSIGNOR.

Although, as a general rule, notice to one of several trustees is a notice to all, yet where one of such trustees was also a beneficiary, and assigned his beneficial interest in the trust fund to a stranger: Held, that the notice acquired by such trustee, as assignor, did not constitute notice to the trustees, so as to prevail over subsequent incumbrancers, it being the interest of such trustee, as assignor, to conceal the assignment; but that where such trustee assigned his beneficial interest to one of his co-trustees, the notice which that co-trustee acquired, as assignee, constituted during his life notice to the trustees, it not being his interest, as assignee, to conceal the assignment, and therefore that

it prevailed over subsequent incumbrancers with notice. [*Browne v. Savage*] 635

ASSIGNOR OF FUND IN COURT.

Upon a petition by an assignee for the payment out of Court of a fund standing to the credit of an assignor, the Court requires the assignor to be served, unless there has been an absolute assignment of the precise fund, even where the total funds assigned exceed the fund in Court. [*Briant v. Denneff*] 550

BANKRUPTCY.

There is no positive rule that a trustee cannot buy from his *cestui que trust*; nor that an assignee in bankruptcy may not buy from a creditor his dividends. But where an assignee bought from a creditor, not in his own name, but in the name of a stranger, and it was not clear that the creditor knew that he was selling to the assignee, the Court directed further enquiry. [*Pooley v. Quilter*] 184

BASTARD.

A domiciled Scotchman had a son born in Scotland, before marriage, and afterwards married the mother in Scotland. The son died seised of land in England, leaving his father surviving. Held, that the father did not inherit from the son. [*Don's Estate*] 194

BENEFIT BUILDING SOCIETIES.

A benefit building society of the ordinary kind certified under the 6 & 7 Will. 4, c. 32, is within the Winding-up Acts 1848 and 1849. [*St. George's Building Society*] 154

BONA VACANTIA.

See ADMINISTRATION.

CHARITY.

A vestry meeting, in which a portion of the parishioners is excluded, is a "meeting in the nature of an open vestry meeting" within the 19 & 20 Vict. c. 112, s. 3. But the election of persons to derive benefit under a charity creating alms-houses, is not a "duty, power or privilege" within the meaning of that clause of the act. [*Attorney-General v. Drapers' Company*] 299

CHATTELS.

The Court will enforce specific performance of a contract to purchase chattels, if damages will not be an adequate compensation. But where the contract, although not actually fraudulent, was one in which the parties were not on an equal footing, the Plaintiff knowing, and the purchaser being ignorant, of the value of the thing sold, and the price appeared to be inadequate, the Court refused relief. [*Falcke v. Gray*] 651

CLOSING EVIDENCE.

Although, under the old practice, it was not competent for a Plaintiff to issue *subpoena* to hear judgment until after the period for passing publication; yet under the new practice, created under the 15 & 16 Vict. c. 86, s. 38, and the 32nd Order of the 7th August, 1852, and the 5th Order of the 13th January, 1855, a Plaintiff may issue a *subpoena* to hear judgment, and set down the cause for hearing after the closing the evidence, and during the period allowed for cross-

examination, even when that period has been enlarged by order. [*Dowson v. Solomon*] 642

COMMISSIONERS OF NATIONAL DEBT.

What evidence will be requisite on a petition under the 56 Geo. 3, c. 60, and 8 & 9 Vict. c. 62. [*Howard v. Kay*] 151

COMPANIES.

The deed of settlement of a banking company contained clauses, empowering the directors to pay and allow to the servants of the company such remuneration, salaries and wages as the court of directors should think proper, and to confirm any contract and all acts done by persons acting as directors in relation to the formation and establishment of the company. The provisional directors entered into a contract with a manager to pay him a salary, and if the bank should discontinue business before the term agreed upon, to pay 1,000*l.* a year for three years, such contract to be confirmed by the proprietary or a board duly authorized. Held, that the directors alone had power to confirm that contract by deed. [*Wilkins v. Roebuck*] . . . 281

COMPANY.

1. The charter and deed of a company gave to a general meeting power to authorize the council to sell or mortgage. The council, in pursuance of a direction of a general meeting, received authority to mortgage. They made a mortgage with a power of sale. Held, that they had no authority to give a power of sale. Discussion of the powers of trustees having a

- special power. [*Clarke v. The Royal Panopticon*] 26
2. A bill by a company alleged that the Defendant had agreed to accept shares. The articles of association were silent as to the mode of acceptance, and the Joint Stock Companies Act, 1856, s. 9, and Sched. B. applied, by which the acceptance must be in writing signed. Defendant had never signed an acceptance. This fact and the statute were set up by plea. Held, I. The plea was bad in form, as it raised no fact not raised by the bill. II. The agreement was a good agreement to do that which the statute required. III. The decree would not be nugatory, as in a joint stock partnership a partner cannot put an end to the partnership, but only to his own quality of shareholder; he must remain shareholder, or constitute another person shareholder in his place. [*New Brunswick, &c. Company v. Muggeridge*] 686

COMPANY'S FRAUD.

The directors of a company, by their reports, grossly misrepresented the state of the company. Those reports got into circulation, and were seen by A., who, on the faith of them, took new shares created by the company. Held, that the fraudulent reports of the directors were the reports of the company, and A. was not properly made a contributory. [*Brockwell's case*] . 205

CONDITION.

1. A will contained a bequest of 1,000*l.* on trusts, and of 5,000*l.* on trusts, and another bequest on trusts in which no sum was mentioned; but the language was continuous, and no actual blank was left. In another part of the will

there was power to invest the said sum of 5,000*l.*, and the said two sums of 1,000*l.* Held, that the latter clause was evidence that the testator intended a bequest of a 1,000*l.* in the bequest in which no sum was named. [*Edmunds v. Waugh*] 275

2. Testator directed, that within three months after his death, in case any child or children of his son should be then living, his executors should invest 5,000*l.* for such child, or, if more than one, for such children equally, of his said son as should attain the age of twenty-one. A subsequent clause was to this effect:— And in case no child or children of my said son shall at my decease have attained, or shall afterwards attain, the age of twenty-one years, then over. Held, that the first clause was not a condition precedent, but merely pointed at the time of investment; and that, though the son had no children, the fund must be invested. [*Ibid.*]

CONDITIONS OF SALE.

1. The particulars of sale described the thing to be sold as an improved ground-rent, amply secured, and stated the property to be held under a sub-lease of the full term of the ground lease. The conditions of sale provided that no objection should be taken by reason of the sub-lease being in excess of the superior lease, and offered previous inspection of the leases, and provided that the purchaser should be held to have notice of the leases, and their effect, whether he inspected or not. Held, that the particulars disclosing the facts, and the conditions referring to the facts, the purchaser was bound, though the particulars and conditions did not particularly state the legal

effect, particularly having regard to the circumstance that inspection was offered. [*Smith v. Watts*] 838

2. A condition of sale by a mortgagee under a power of sale, entitling the vendor to rescind the contract in case he should be unwilling or unable to answer any requisition, is depreciatory in a sense, but not so depreciatory as to be improper, being one that a prudent owner would introduce, and, therefore, held binding on the mortgagor. [*Faulkner v. Equitable Reversionary Society*] . 352

CONFIDENTIAL COMMUNICATIONS.

The same privilege with respect to the non-production of confidential communications as between an English solicitor and his client is extended to like communications as between a Scotch solicitor and law agent practising in London (though not admitted an English solicitor) and his client in *Scotland*. [*Lawrence v. Campbell*] . . . 485

CONSTRUCTION.

1. A clear gift by a will to testator's son, on his attaining twenty-one, followed by limitations over, the construction of which was very doubtful: Held, that the rule applied; that a clear gift cannot be cut down except by limitations equally clear. [*Randfield v. Randfield*] 147
2. Limitation by will to certain persons, with a direction that they should within twelve months next after becoming entitled in possession take testator's name and arms, and that if they should decline, neglect or discontinue such name and arms for twelve months after becoming entitled, their estates should go over. Held, that a

donee who took the name and arms and used them for some years after becoming entitled in possession, and then discontinued them for twelve months, had committed the forfeiture, and the remainders over took effect. [*Blagrove v. Bradshaw*] . . . 230

3. A will contained a bequest of 1,000*l.* on trusts and of 5,000*l.* on trusts, and another bequest on trusts in which no sum was mentioned; but the language was continuous, and no actual blank was left. In another part of the will there was power to invest the said sum of 5,000*l.* and the said two sums of 1,000*l.* Held, that the latter clause was evidence that the testator intended a bequest of 1,000*l.* in the bequest in which no sum was named. [*Edmunds v. Waugh*] 275

4. Testator directed that within three months after his death, in case any child or children of his son should be then living, his executors should invest 5,000*l.* for such child, or, if more than one, for such children equally of his said son as should attain the age of twenty-one. A subsequent clause was to this effect: And in case no child or children of my said son shall at my decease have attained or shall afterwards attain the age of twenty-one, then over. Held, that the first clause was not a condition precedent, but merely pointed at the time of investment, and that, though the son had no children, the fund must be invested. [*Ibid.*]

5. Gift "to survivors of a class and the issue of such survivor, such issue to take the parent's share only," is a gift to the parents for life, with remainder to their children, and not a substitutionary gift. [*Parsons v. Coke*] . 296

6. A vestry meeting, in which a portion of the parishioners is excluded, is a meeting in the nature of an open vestry meeting within the 19 & 20 Vict. c. 112, s. 3. But the election of persons to derive benefit under a charity creating almshouses, is not a "duty, power or privilege" within the meaning of that clause of the act. [*Attorney-General v. Drapers' Company*] 299
7. A direction to keep buildings in good repair means, not the state of repair in which they were at the testator's death, but in habitable repair: "farming buildings" includes "farmhouses." [*Cooke v. Cholmondeley*] 326
8. By a will a sum of stock was given to trustees out of the dividends to pay annuities to A., B. and C. for their lives, and after their deaths to pay the annuities to E., F. and G., without saying for life or otherwise, and after the death of survivor of E. F. and G. to pay the stock to H. Held, that the annuities were to endure till the death of the survivor, and the representative of a deceased annuitant was entitled till the death of the surviving annuitant. [*Bignold v. Giles*] 343
9. *Edmund Turton* was tenant for life of the *Turton* estate, and his eldest son *Edmund Henry Turton* was tenant in tail expectant. *Robert Bell Livesey* devised his real estates upon several series of limitations for life, with remainder to the sons of the tenant for life in tail, and among those limitations was a limitation for life to *E. H. Turton* for life, remainder to trustees to preserve, remainder to his second and other sons in tail. Then followed several limitations, and among them was a limitation to the Plaintiff for life; and he concluded by a proviso, that in case *R. C. Turton*, one of the tenants for life, or the heirs of his body, or any other tenant for life or in tail, should become seised of the settled family estates of *Edmund Turton*, then the limitations of his will in favor of such persons should cease, as if he, she or they were dead, and the estates so limited were to go to the persons next entitled in remainder, it being his will that both the estates should not vest in the same person, except as was otherwise hereinbefore provided. And there was no such express provision in the will. In the events which happened, *Edmund Henry Turton*, the eldest son of *Edmund Turton*, became seised of the *Turton* estates, and was the person (if it had not been for the proviso for cesser) entitled as tenant for life of the devised estates. He had no second or third sons, and he entered into possession. The next limitation in terms was to the trustees to preserve, and the next tenant for life was, in the events, the Plaintiff. Held, that *E. H. Turton* was not excepted out of the proviso by the concluding paragraph of it, and that the persons entitled were the trustees to preserve contingent remainders for the unborn second and other sons of *E. H. Turton*. (And see general propositions laid down at the conclusion of the judgment.) [*Lambarde v. Peach*] 553
10. Limitation of an incorporeal hereditament to A., his heirs and assigns, for lives. A. conveys it to trustees, their executors and administrators, upon contingencies which never happened. Held, that he had parted with his whole estate at law, but with a resulting beneficial interest in him in so much as he had limited on the contingencies. [*Northern v. Carnegie*] 587

11. The word "survivors" held on the context to mean strictly "survivors" and not "others." [*Northen v. Carnegie*] 587
 12. *Seemle*, that an executor may be special occupant of an incorporeal hereditament. [*Ibid.*]
 13. A deed of inspectorship contained many clauses referring to a division and winding up the debtor's estate as if he had become bankrupt, but some clauses were not quite consistent with that intention. Held, on the general construction, that the intention was to deal with the matter as if in bankruptcy. [*Kingsford v. Swinford*] 705
 14. A deed of inspectorship recited that it had been resolved to prepare such a deed for winding up the estate of the debtor according to the rules in bankruptcy, and declared that the surplus monies should, after payment of costs and expenses, be divided among creditors as if the debtor had become bankrupt, and generally that the assets should be distributable, and the rights and equities between the creditors and between the creditors and the debtors be the same as if the debtor had been made bankrupt. It provided also that nothing in the deed should prevent the parties to it from having the benefit of any mortgages, claims, charges or liens on the estate. A creditor who held a policy proved for and received dividends on the whole debt and retained his policy. Held, that he was not entitled to do so, and that he could not be allowed to sue the debtor for breach of covenant in not paying further premiums; the construction of the deed showing on the whole the intention of the parties that they were to deal with each other as if the matter were in bankruptcy. [*Ibid.*]
- VOL. IV.

CONTRIBUTORY.

1. The directors of a company, by their reports, grossly misrepresented the state of the company. Those reports got into circulation, and were seen by A., who, on the faith of them, took new shares created by the company. Held, that the fraudulent reports of the directors were the reports of the company, and A. was not properly made a contributory. [*Brockwell's Case*] 205
2. Where the directors of a company, in the discharge of their duty, make a report to a general meeting of the shareholders containing misrepresentations, and a third person, relying on those misrepresentations, deals with the company by taking shares direct from the company, those representations vitiate the whole transaction. But where a third person, relying on such misrepresentations, takes shares not from the company, but from a shareholder in the company, the transaction is not vitiated, and the third person is liable as a contributory in respect of the shares he has so taken. [*National Patent, &c., Company, Worth, ex parte*] 529
3. There is no inherent power in the directors, or in a general meeting of the shareholders in a company, to declare a forfeiture of shares. Therefore a person who had taken shares, but had not signed the deed, and whose shares had been declared forfeited by the directors with the sanction of a general meeting of the shareholders, was not relieved from his liability as a contributory, the forfeiture being *ultra vires*, and the directors not being expressly empowered by the deed to forfeit shares. [*Barton's Case*] 535

COSTS.

1. The Lands Clauses Consolidation Act, sect. 80, contemplates not one application in respect of several re-investments, but several applications, and where it was shown to be "for the benefit of the parties," the Court ordered a company to pay the costs of a third re-investment in a very small purchase. [*The Trustees of St. Bartholomew's Hospital*] . . . 425
2. A pawnbroker bought the stock of a trader in a hasty manner, and without making any enquiries whether he was indebted, or why he wanted to sell in a hurry. There were other circumstances of suspicion as to the *bona fides* of the sale, particularly that the purchaser did not call the vendor as a witness; due change of possession took place, but no public manifestation of it was made. The vendor was, at the time of the sale, liable to process for debt, and a few days after the sale execution issued. Held, first, that if *bona fide* for valuable consideration, a sale of goods is not invalidated by knowledge that an execution is intended (following *Wood v. Dixie*, 9 Q. B. 892). Secondly, that there being proof of payment and change of possession, the circumstances of suspicion did not amount to proof of fraud, and the purchase was good against the execution creditor. The suit was an interpleader suit by the sheriff: Held, that the sheriff was entitled to his costs of suit against the parties setting him in motion, but not in this suit to his costs of possession. [*Hale v. Saloon Omnibus Company*] 492
3. Where a bill was dismissed with costs as against a husband and wife, so far as it sought to charge the wife's separate estate, and the husband was ordered to make

certain payments to the Plaintiff in respect of another demand in the same suit. Held, that the costs of so dismissing the bill as against the husband and wife were payable by the Plaintiff to the husband alone; and also that the Plaintiff was entitled to set off these costs against the amounts so ordered to be paid by the husband to him. [*Wright v. Chard*] 702

COSTS OF APPLICATION.

Where a Plaintiff had been ordered to pay costs to Defendants, and Defendants issued execution for those costs, but the sheriff had made no return on the writ, and the same Defendants were subsequently ordered to pay the Plaintiff costs of a less amount, the Court granted the Defendants leave to set off the costs the Defendants had been ordered to pay the Plaintiff, on the Defendants' undertaking not to levy more on the execution than the balance of costs remaining due to them after such set-off. The Defendants not having asked for a set-off when the order against them for costs was made, the Court made the order for a set-off without costs. [*Bryon v. Metropolitan Saloon, &c. Company*] . . 546

COSTS OF DEFENDANT INFANT HEIR AT LAW OF MORTGAGOR.

Where an equitable mortgagee, by deposit, institutes a suit merely to realize his security, and not for the administration of the general estate of the deceased mortgagor, and a sale of the mortgaged property having been directed, the proceeds of the sale prove insufficient to satisfy both, the mortgagee is entitled to the payment of his debt, interest and costs before the payment of the costs of the Defendant.

ant infant heir of the mortgagor.
[*Wade v. Ward*] 602

CROWN.

On the death of an intestate no next of kin appeared. The Crown nominated the Crown solicitor to take out administration; the administrator held the fund, paid all outgoing, and after a certain time handed over the fund to the King's proctor for the use of his Majesty; afterwards the Plaintiffs established their title. Held, that the Crown must restore the fund with interest, the interest to be computed from the time when all payments on the part of the estate had been made. [*Edgar v. Reynolds*] 269

CUSTOMARY PAYMENT IN LIEU OF TITHES.

Bill by the rector of the parish of *Whitechapel* against certain householders claiming payments in respect of their houses, either as tithes or in lieu of tithes, or as a rate-tithe. The Plaintiff did not by his bill specifically state whether he claimed in respect of a *modus proper*, or of a special custom affecting all houses in the parish, or in respect of prescriptive rights affecting the particular houses, but at the bar contended that there was a custom. With reference to the claim on the ground of *modus proper*, the evidence showed that the Plaintiff claimed a distinct annual sum as payable by the occupier of each house in the parish; and he claimed also an additional annual payment in respect of every additional building that might be erected on the site of any building already liable. With reference to the ground of prescription, the evidence showed that as to three of

the Defendants, their houses had been erected within memory; as to the fourth, the date of the erecting of his house was not known, and a payment for 120 years was proved; but it appeared that the amount paid had varied, in 1811 it was 8*s.* per year, and then it was increased to 14*s.* With reference to the ground of custom affecting all the houses in the parish whenever built, the custom alleged was that as to new houses, the annual amount payable was such as should be agreed upon, and if no agreement could be come to, then to be ascertained by reference to the amounts paid for other buildings of a like nature. There was no personal evidence of the custom; and the account books referred to, though they showed payments, did not show on what certain principle the custom was founded. Held, that the claim could not be supported as a prescriptive right; and that, as grounded on custom—first, the custom, if well alleged, was too uncertain; secondly, that it was not alleged with sufficient distinctness; and the bill was dismissed. [*Champneys v. Buchan*] 104

DEBT.

Where a debtor gives a legacy to his creditor, the Court will lay hold of minute discrepancies between the debt and the thing given, to rebut satisfaction. Thus, when the debtor gave 400*l.* to a creditor to whom he owed 145*l.*, and gave him also other large benefits by way of life estates, and remainders in real and personal estate, and expressly directed his debts and legacies to be paid, it was held that the debt was not satisfied by the legacy or any other of the benefits given. [*Hassell v. Hawkins*] . . . 468

DEBTOR AND CREDITOR.

1. In the absence of special circumstances, a purchaser has a right to insist on paying the purchase-money into the hands of the vendor; a verbal authority to the vendor's solicitor does not deprive the purchaser of this right: and, *semble*, that a power of attorney or other written authority would not. A purchaser has also a right to have the deed executed in his presence, and attested by a witness of his own choosing. [*Viney v. Chaplin*] 237
2. A deed of inspectorship contained many clauses referring to a division and winding up of the debtor's estate as if he had become bankrupt, but some clauses were not quite consistent with that intention. Held, on the general construction, that the intention was to deal with the matter as if in bankruptcy. A deed of inspectorship recited that it had been resolved to prepare such a deed for winding up the estate of the debtor according to the rules in bankruptcy, and declared that the surplus monies should, after payment of costs and expenses, be divided among creditors as if the debtor had become bankrupt; and generally, that the assets should be distributable, and the rights and equities between the creditors and between the creditors and the debtors be the same, as if the debtor had been made a bankrupt. It provided also, that nothing in the deed should prevent the parties to it from having the benefit of any mortgages, claims, charges or liens on any estate. A creditor who held a policy proved for and received dividends on his whole debt and retained his policy. Held, that he was not entitled to do so, and that he could not be allowed to sue the debtor for breach of covenant in not paying further premiums:

the construction of the deed showing on the whole the intention of the parties that they were to deal with each other as if the matter were in bankruptcy. [*Kingsford v. Swinford*] 705

DECREE (FORM OF).

Where a bill was dismissed with costs as against husband and wife, so far as it sought to charge the wife's separate estate, and the husband was ordered to make certain payments to the Plaintiff in respect of another demand in the same suit. Held, that the costs of so dismissing the bill as against the husband and wife were payable by the Plaintiff to the husband alone; and also that the Plaintiff was entitled to set off these costs against the amounts so ordered to be paid by the husband to him. [*Wright v. Chard*] 702

DEED.

A deed of inspectorship contained many clauses referring to a division and winding up of the debtor's estate as if he had become bankrupt, but some clauses were not quite consistent with the intention. Held, on the general construction, that the intention was to deal with the matter as if in bankruptcy. A deed of inspectorship recited that it had been resolved to prepare such a deed for winding up the estate of the debtor according to the rules in bankruptcy, and declared that the surplus monies should, after payment of costs and expenses, be divided among creditors as if the debtor had become bankrupt; and generally, that the assets should be distributable, and the rights and equities between the creditors and between the creditors and the debtors be the same, as if the debtor had been made bankrupt. It provided also that nothing in the

deed should prevent the parties to it from having the benefit of any mortgages, claims, charges or liens on any estate. A creditor who held a policy proved for and received dividends on his whole debt and retained his policy. Held, that he was not entitled to do so, and that he could not be allowed to sue the debtor for breach of covenant in not paying further premiums: the construction of the deed showing on the whole the intention of the parties that they were to deal with each other as if the matter were in bankruptcy. [*Kingsford v. Swinford*] 705

DEMURRER.

1. A bill alleged, in par. 2, that on the marriage of the Plaintiff with the daughter of *R. C. Young*, no portion was given by *Young* to his daughter; but that previously to, and as an inducement to the marriage, *Young* represented to Plaintiff, and promised and contracted with him, that he, *Young*, would at his death leave to his daughter an equal share with his other children, and the marriage took place on the faith of that promise. In par. 7, it alleged that Plaintiff, on the issuing of a certain commission of lunacy by *Young* against Plaintiff, filed an affidavit containing these words: "I say I believe that the said *R. C. Young* is not a man of considerable property, because on my marriage with his daughter he confessed his inability to give or provide her any marriage portion," and that in reply *Young* filed another, stating thus: "The statement contained in the affidavit of the said *G. Barkworth* (the Plaintiff), that his reason for believing me not to be a man of considerable property is, that on his marriage with my daughter I confessed to

him my inability to provide any marriage portion, is not correct; according to the best of my recollection and belief, the words I made use of on that occasion were: 'There will be no money for you now, but at my death she (meaning my late daughter *Mrs. Barkworth*) shall share with the rest of my children.'"
Young died in 1855, surviving *Mrs. Barkworth*, having given away his property by will, and not having, by his will or otherwise, made any provision for *Mrs. Barkworth* or her children. Held, on demurrer:—1. That the Statute of Frauds may be set up by demurrer. 2. That the allegation in par. 1 was only a verbal agreement. 3. That the allegation of the statement by affidavit in par. 7 was an allegation of a sufficient note or memorandum in writing of the verbal agreement. 4. That such a memorandum, though written after the marriage, was sufficient. 5. That the agreement might have been performed in two ways; by *Young* making a provision by will for his daughter, or by dying intestate; and that, though he was precluded by his daughter's death from performing it in the first way, he was not thereby exonerated from making a provision in the way still open to him, of dying intestate; and, therefore, the Plaintiff's bill, praying for an equal share of the testator's residuary estate, was not on that ground demurrable. But held, that the representatives of the deceased daughter ought to have been parties. [*Barkworth v. Young*] 1.
 2. A bill by A. against B. and C. (within the jurisdiction), alleging that B. had obtained possession of real estate in *Scotland* to which A. was entitled as heir under a testamentary instrument, by fraudulently procuring a decree of a

- Scotch Court establishing the title of B. as heir ; alleging also gross frauds by C. in respect of the personal estate, and that B. had assisted in them ; but admitting that B. had no interest in the personal estate and had nothing to do with it. The bill prayed an account of personal estate, and of rents and profits of the real estate, and costs against both Defendants. The testamentary instrument was the title both to the real and personal estate, and both estates were included in the same set of trusts. Held, on demurrer, that the bill was not multifarious ; and that the prayer for costs against B. prevented the bill from being demurrable. [*Innes v. Mitchell*] 57
3. A bill of review must state on the face of it that it is filed with the leave of the Court ; if it does not it is demurrable. A general demurrer does not include, as a demurrer on the record, the ground of the bill (being a bill of review) not stating on the face of it that it is by leave of the Court ; but that ground may be taken *ore tenus*. A bill, purporting to be an original bill, sought to review a prior decree in a suit between the same parties, on the ground of the decree having been obtained by fraud ; the fraud alleged was, that the defendants had in their answer concealed certain facts from the Plaintiffs and the Court ; but it appeared that those facts might have been elicited by exceptions. Held, that was not such fraud as to justify an original bill, without leave of the Court, to review a decree. [*Henderson v. Cook*] 306
4. A bill, setting up a case that an absolute conveyance of an equity of redemption was made to the Defendants on the faith of a verbal promise to reconvey on being paid the price, alleged that the effect of the agreement was so, but did not set out the terms of the agreement *totidem verbis* as a fact. Held, that there was a sufficient allegation of a promise, and that the Court could not say on demurrer that there could be no relief. [*Morison v. Morison*] 315
5. Where a bill is filed seeking to rectify an instrument, and for the appointment of new trustees, the Court, though it may not be able to rectify the instrument, will grant relief so far as to appoint new trustees. Therefore, where a bill was filed to rectify a settlement in a foreign form, and praying the appointment of new trustees, and the Defendant demurred to the bill for the want of equity and for want of jurisdiction, the Court overruled the demurrer, but without costs, the Plaintiff not satisfying the Court that he would be entitled at the hearing to have the settlement rectified. *Semble*, that want of jurisdiction and want of equity, being two distinct grounds of demurrer, ought, if the Defendant intends to raise them both on the record, to be stated as two distinct and separate causes of demurrer. [*Barber v. Barber*] 666

DESCENT.

- A domiciled Scotchman had a son born in *Scotland* before marriage, and afterwards married the mother in *Scotland*. The son died seised of land in *England*, leaving his father surviving. Held, that the father did not inherit from the son. [*Don's Estate*] 194

DESCRIPTIO PERSONÆ.

- A gift to the then minister of the Catholic Chapel at K. of a surplus of the produce of the sale of some of testator's real estate, held void. [*Thornber v. Wilson*] 350

DISMISSING BILL.

Where a Defendant has resisted the Plaintiff's demand, and the parties were going into evidence, and then the Defendant, having offered to do all the Plaintiff required except to pay his costs, and moving to dismiss without costs. Held, that such a motion could not be sustained; but there being *dicta* which might have misled him, the costs of the motion were made costs in the cause. And, *per curiam*, an application to stay proceedings by a Plaintiff on payment of his costs, or of a Defendant to dismiss the bill without costs, may be sustained under circumstances, where the Court can see its way by matter extrinsic to the merits. But on such an application the Court will never go into the merits. [*Wallis v. Wallis*] 458

DOMICILE.

Discussion of the rules as to domicile, and definition of domicile. A., a Scotchman, whose family had for 200 years owned a small estate in *Scotland*, went to *India*, and there resided for many years. He then returned to *Scotland*, and lived on the family estate for some years. He then, under the influence of several motives, the most apparent of which was to educate his sons at a particular school in *Switzerland*, went to live in *Switzerland*; shortly afterwards he withdrew his sons, and went with his family to *Paris*, where he lived for five years, living in apartments taken for a lease and furnished by himself. He died in *France*. The evidence as to his intending to return to *Scotland* was conflicting; the principal evidence in favor of such intention was, that he kept up his Scotch property, and by correspondence directed the management

of it with great minuteness. Held, without positively deciding that there was a balance of evidence, that you must have stronger evidence to show abandonment of original domicile for a foreign domicile, than to show retention of original domicile; and that in this case the testator's domicile remained Scotch. [*Lord v. Colvin*] 366

ECCLESIASTICAL BENEFICE.

The 17 Geo. 3, c. 53, enables the incumbent of a living, with the consent of the bishop and patron, to add to as well as to repair or rebuild a rectory house, and necessary or sufficient repairs under that act means such repairs or additions as the bishop thinks fit for making the rectory a fit and comfortable habitation for a clergyman. [*Boyd v. Barker*] 583

EQUITABLE DEFENCE AT LAW.

Although, where a Defendant at law has pleaded an equitable plea, this Court will not allow him by injunction to remove the cause into equity; yet if a Defendant, without pleading his equitable plea at law, comes into equity in the first instance and asserts his equitable defence, the Court will interfere by injunction. [*Gompertz v. Pooley*] 448

ESTATE TAIL.

A devise by will to A. for life; remainder to A.'s children and their heirs as tenants in common. Devise by codicil of after-purchased estates to A. for life, remainder to the heirs of his body lawfully begotten for ever, equally share and share alike, sons or daughters, but if A. should die without heirs or heir, then over. Held, that A. took an estate tail in the property

devised by the codicil. [*Grimson v. Downing*] 125

EVIDENCE.

1. What evidence will be requisite on a petition under the 56 Geo. 3, c. 60, and 3 & 9 Vict. c. 62. [*Howard v. Kay*] 151
2. Where, upon an issue between parties, the testimony of a witness since deceased has been received, which either of those parties might have used against the other, that evidence may be used between the same parties in any subsequent proceedings on the same issue. Upon a petition for the re-transfer of stock under 56 Geo. 3, c. 60, service on the Commissioners and also on the Attorney-General is required by the act. The Court will presume, at the hearing of the petition, that the Attorney-General represents, not only the Commissioners and the Crown as *parens patriæ*, but also the Crown in its beneficial capacity. Therefore, where testimony of a witness since deceased was received upon a petition under that act, that testimony is receivable in a subsequent proceeding against an administrator nominated by the Crown, and the Crown by a party to the former proceedings, or his representatives. [*Lawrence v. Maule*] 472

EXCEPTIONS.

A bill alleged that money had been placed in the hands of Defendants for certain payments, and enquiry into the application of such money. The answer averred that the particular sum had been, by agreement, placed in the hands of the Defendants without recourse from Plaintiff, and submitted that no discovery could be asked. Held, that all the circumstances might be essential in deciding the construction of the agreement, and the

answer was insufficient. [*Blekeley v. Rymer*] 248

EXECUTION CREDITOR.

A pawnbroker bought the stock of a trader in a hasty manner, and without making any enquiries whether he was indebted, or why he wanted to sell in a hurry. There were other circumstances of suspicion as to the *bona fides* of the sale, particularly that the purchaser did not call the vendor as a witness; due change of possession took place, but no public manifestation of it was made. The vendor was, at the time of the sale, liable to process for debt, and a few days after the sale execution issued. Held, first, that if *bona fide* for valuable consideration, a sale of goods is not invalidated by knowledge that an execution is intended (following *Wood v. Dixie*, 9 Q. B. 892). Secondly, that there being proof of payment and change of possession, the circumstances of suspicion did not amount to proof of fraud, and the purchase was good against the execution creditor. The suit was an interpleader suit by the sheriff. Held, that the sheriff was entitled to his costs of suit against the parties setting him in motion, but not in this suit to his costs of possession. [*Hale v. Saloon Omnibus Company*] . . . 492

FORFEITURE OF SHARES BY DIRECTORS.

There is no inherent power in the directors, or in a general meeting, of the shareholders in a company to declare a forfeiture of shares. Therefore a person who had taken shares, but had not signed the deed, and whose shares had been declared forfeited by the directors with the sanction of a general

meeting of the shareholders, was not relieved from his liability as a contributory; the forfeiture being *ultra vires*, and the directors not being expressly empowered by the deed to forfeit shares. [*Barton's Case*] 535

FRAUD.

Where a donee exercises a power of appointment in favor of one of several objects of the power, with a view to the benefit of a stranger, the appointment is fraudulent and void, even although the appointee is ignorant of the fraud, and the motive of the donee is not morally wrong. Therefore, where a married woman, having a power to appoint a fund, of which she received the income for her life, among her children, appointed the whole fund at her death to her eldest daughter, in order that thereout the daughter should benefit her father, but the daughter was not informed of the mother's intention until after her death. Held, that such appointment was void. [*In re Marsden's Trust*] 594

FRAUDULENT SALE.

A pawnbroker bought the stock of a trader in a hasty manner, and without making any enquiries whether he was indebted, or why he wanted to sell in a hurry. There were other circumstances of suspicion as to the *bona fides* of the sale, particularly that the purchaser did not call the vendor as a witness; due change of possession took place, but no public manifestation of it was made. The vendor was, at the time of the sale, liable to process for debt, and a few days after the sale execution issued. Held, first, that if *bona fide* for valuable consideration, a sale of goods is not invalidated by

knowledge that an execution is intended (following *Wood v. Disie*, 9 Q. B. 892). Secondly, that there being proof of payment and change of possession, the circumstances of suspicion did not amount to proof of fraud, and the purchase was good against the execution creditor. The suit was an interpleader suit by the sheriff: Held, that the sheriff was entitled to his costs of suit against the parties setting him in motion, but not in this suit to his costs of possession. [*Hale v. Saloon Omnibus Company*] 492

GIFT TO CLASS.

Testator gave after the death of A., one of his children, to such of his other children as should be living at the death of A. Held, this was a gift to a class, and that, one of the children having died before the testator, the survivors took the whole. [*Cruse v. Howell*] 215

HUSBAND AND WIFE.

Where a bill was dismissed with costs as against husband and wife, so far as it sought to charge the wife's separate estate, and the husband was ordered to make certain payments to the Plaintiff in respect of another demand in the same suit:—Held, that the costs of so dismissing the bill as against the husband and wife were payable by the Plaintiff to the husband alone; and also that the Plaintiff was entitled to set off these costs against the amounts so ordered to be paid by the husband to him. [*Wright v. Chard*] 702

INCORPOREAL HEREDITAMENTS.

1. Limitation of an incorporeal hereditament to A., his heirs and as-

signs, for lives. A. conveys it to trustees, their executors and administrators, upon contingencies which never happened. Held, that he had parted with his whole estate at law; but with a resulting beneficial interest in him in so much as he had limited on the contingencies. [*Northen v. Carnegie*]

587

2. The word "survivors" held on the context to mean strictly "survivors" and not "others." [*Ibid.*]
3. *Seem*, that an executor may be special occupant of an incorporeal hereditament. [*Ibid.*]

INHERITANCE ACT.

A domiciled Scotchman had a son born in *Scotland* before marriage, and afterwards married the mother in *Scotland*. The son died seised of land in *England*, leaving his father surviving. Held, that the father did not inherit from the son. [*Don's Estate*] 194

INTERPLEADER.

A pawnbroker bought the stock of a trader in a hasty manner and without making any enquiries whether he was indebted, or why he wanted to sell in a hurry. There were other circumstances of suspicion as to the *bona fides* of the sale, particularly that the purchaser did not call the vendor as a witness; due change of possession took place, but no public manifestation of it was made. The vendor was, at the time of the sale, liable to process for debt, and a few days after the sale execution issued. Held, first, that if *bona fide* for valuable consideration, a sale of goods is not invalidated by knowledge that an execution is intended (following *Wood v. Dixie*, 9 Q. B. 892). Secondly, that there being proof of

payment and change of possession, the circumstances of suspicion did not amount to proof of fraud, and the purchase was good against the execution creditor. The suit was an interpleader suit by the sheriff. Held, that the sheriff was entitled to his costs of suit against the parties setting him in motion, but not in this suit to his costs of possession. [*Hale v. Saloon Omnibus Company*] 492

INJUNCTION.

Although where a Defendant at law has pleaded an equitable plea, this Court will not allow him by injunction to remove the cause into equity, yet if a Defendant without pleading his equitable plea at law comes into equity in the first instance and asserts his equitable defence, the Court will interfere by injunction. [*Gompertz v. Pooley*] 448

JURISDICTION.

1. An agreement for sale of leasehold premises and the goodwill of a trade, and certain fixtures to be taken at a valuation, to be made by two guagers, to be named, or their umpire. Held, that the Court could not decree specific performance of an agreement, one part of which was left to be determined by arbitration. [*Darbey v. Whitaker and another*] . . . 134
2. Where a bill is filed seeking to rectify an instrument and for the appointment of new trustees, the Court, though it may not be able to rectify the instrument, will grant relief so far as to appoint new trustees. Therefore, where a bill was filed to rectify a settlement in a foreign form, and praying the appointment of new trustees, and the Defendant demurred to the bill for want of equity and for

want of jurisdiction, the Court overruled the demurrer, but without costs, the Plaintiff not satisfying the Court that he would be entitled at the hearing to have the settlement rectified. *Semble*, that want of jurisdiction and want of equity, being two distinct grounds of demurrer, ought if the Defendant intends to raise them both on the record, to be stated as two distinct and separate causes of demurrer. [*Barber v. Barber*] . . . 666

JURY.

The 21 & 22 Vict. c. 27, intends a jury to be called only where before an issue would have been directed, and therefore, where a cause was ready to be heard, the Court refused to call a jury to try certain issues of fact. *George v. Whitmore*, 7 W. R. 225, approved. [*Bradley v. Bevington*] . . 511

LAPSE.

Testator gave after the death of A., one of his children, to such of his other children as should be living at the death of A. Held, this was a gift to a class, and that one of the children having died before the testator, the survivors took the whole. [*Cruse v. Howell*] . 215

LEGACY.

Where a debtor gives a legacy to his creditor, the Court will lay hold of minute discrepancies between the debt and the thing given, to rebut satisfaction. Thus, when the debtor gave 400*l.* to a creditor to whom he owed 145*l.*, and gave him also other large benefits by way of life estates, and remainders in real and personal estate, and expressly directed his debts and legacies to be paid, it was held that the debt was not satisfied by the legacy or any others of the benefits given. [*Hassell v. Hawkins*] . . 468

LENGTH OF TITLE.

1. A title more than sixty years old commenced by a general devise; a deed more than sixty years old recited the seisin of the devisor. Held, that that, coupled with the continued possession, was sufficient evidence of seisin. [*Parr v. Lovegrove*] . . . 170
2. A title is first shown, when the abstract states all the matters which, if proved, make a good title. A title is made, when the matters are proved. [*Ibid.*]
3. Where a title commenced by a general devise, and seisin only proved as stated in proposition 1, and there was ground to assume that the vendor had deeds earlier than those on the abstract. Whether a purchaser is generally entitled to inspection of deeds earlier than a sixty years' title, *quære*. [*Ibid.*]

MESNE PROFITS.

1. A trustee or an apparent trustee for A., who was in possession of an estate, was also committee of B., a lunatic, who claimed the estate, and the trustee was perfectly aware of the claim. On a bill being filed to recover the estate for B., it was decided that the estate was his. Held, that the trustee was liable to B. for the rents received by him and paid to A. [*Wright v. Chart*] . 673
2. The rule of the Court of Chancery, in a suit to recover land in the nature of equitable ejectment, is not that the Court never gives an account of rents beyond the filing of the bill; but it is a rule of discretion, and where the circumstances justified delay, the Court gave an account of rents antecedent to the filing of the bill. [*Ibid.*]
3. Where a married woman received rents of an estate as her separate

property, claiming to be entitled, but it turned out that she was not entitled, the Court refused to give relief to the real owner against her other separate estate. [*Wright v. Chart*] 673

4. *Semble*, that a married woman may make her separate estate liable by parol engagement as well as by express contract; but there must be some engagement or contract. [*Ibid.*]

MISREPRESENTATION IN REPORT OF DIRECTORS.

Where the directors of a company in the discharge of their duty make a report to a general meeting of the shareholders containing misrepresentations, and a third person, relying on those misrepresentations, deals with the company by taking shares direct from the company, those representations vitiate the whole transaction. But where a third person, relying on such misrepresentations, takes shares not from the company, but from a shareholder in the company, the transaction is not vitiated, and the third person is liable as a contributory in respect of the shares he has so taken. [*National Patent, &c. Company, Worth, ex parte*]

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MODUS.

Bill by the rector of the parish of *Whitechapel* against certain householders claiming payments in respect of their houses, either as tithes or in lieu of tithes, or as a rate-tithe. The Plaintiff did not by his bill specifically state whether he claimed in respect of a modus proper, or of a special custom affecting all houses in the parish, or in respect of prescriptive rights affecting the particular houses, but at the bar contended that there was a custom. With reference to the claim on the

ground of modus proper, the evidence showed that the Plaintiff claimed a distinct annual sum as payable by the occupier of each house in the parish; and he claimed also an additional annual payment in respect of every additional building which might be erected on the site of any building already liable. With reference to the ground of prescription, the evidence showed that as to three of the Defendants, their houses had been erected within memory; as to the fourth, the date of the erection of his house was not known, and the payment for 120 years was proved; but it appeared that the amount paid had varied; down to 1811 it was 8s. per year, and then it was increased to 14s. With reference to the ground of custom affecting all the houses in the parish whenever built, the custom alleged was, that as to the new houses the annual amount payable was such as should be agreed upon, and if no agreement could be come to, then to be ascertained by reference to the amounts paid for other buildings of a like nature. There was no personal evidence of the custom; and the account books referred to, though they showed payments, did not show on what certain principle the custom was founded. Held, that the claim could not be supported as a prescriptive right; and that, as grounded on a custom, first, the custom, if well alleged, was too uncertain; secondly, that it was not alleged with sufficient distinctness; and the bill was dismissed. [*Champneys v. Buchan*]

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MORTGAGEE.

A bill was filed by a legatee of a legacy charged on a term of years against the trustee and against the mortgagee of the term under a

mortgage made by the surviving trustee, who had power to give receipts. The bill made a case against the mortgagee of knowledge of circumstances which affected him with a breach of trust, but did not allege that the deed disclosed those circumstances. The mortgagee's answer admitted the deed, and craved leave to refer to it when produced; but denied the notice. Held, that the Plaintiff could not have production of the mortgage deed. [*Howard v. Robinson*] 522

MORTGAGEE'S SUIT.

Where an equitable mortgagee by deposit institutes a suit merely to realize his security, and not for the administration of the general estate of the deceased mortgagor, and a sale of the mortgaged property having been directed, the proceeds of the sale prove insufficient to satisfy both, the mortgagee is entitled to the payment of his debt, interest and costs before the payment of the costs of the Defendant infant heir of the mortgagor. [*Wade v. Ward*] 602

MORTGAGOR AND MORTGAGEE.

A condition of sale by a mortgagee under a power of sale, entitling the vendor to rescind the contract in case he should be unwilling or unable to answer any requisition, is depreciatory in a sense, but not so depreciatory as to be improper, being one that a prudent owner would introduce, and, therefore, held binding on the mortgagor. [*Faulkner v. Equitable Reversionary Society*] 352

MORTMAIN.

A gift to the then minister of the Catholic Chapel at K., of a sur-

plus of the produce of the sale of some of testator's real estate, held void. [*Thornber v. Wilson*] 350

MULTIFARIOUSNESS.

A bill by A. against B. and C. (within the jurisdiction), alleging that B. had obtained possession of real estate in *Scotland* to which A. was entitled as heir under a testamentary instrument, by fraudulently procuring a decree of a Scotch Court establishing the title of B. as heir; alleging also gross frauds by C. in respect of the personal estate, and that B. had assisted in them; but admitting that B. had no interest in the personal estate, and had nothing to do with it. The bill prayed an account of personal estate, and of rents and profits of the real estate, and costs against both Defendants. The testamentary instrument was the title both of the real and personal estate, and both estates were included in the same set of trusts. Held, on demurrer, that the bill was not multifarious; and that the prayer for costs against B. prevented the bill from being demurrable. [*Innes v. Mitchell*] 57

NEGLIGENCE.

1. A., an articulated clerk to B., a solicitor, and also his step-son, lent him 1,500*l.* on the promise of a security on lands. He asked for the title deeds, but omitted to require possession of them before advancing the money, on the mortgagee's stating he should have them, but could not immediately lay his hands upon them. Afterwards finding the mortgagee embarrassed, he pressed for and obtained an assignment. The property was afterwards found to be under equitable mortgage to C. Held, that B.'s knowledge did not

- affect A. with constructive notice, and that the circumstances were not such as to amount to fraudulent negligence in A., so as to postpone him to C. [*Espin v. Pemberton*] 333
2. Where A. & Co. are solicitors for a Plaintiff and also for the receiver, and the receiver remits to them money to be paid into Court in respect of his balances, which money they misapply, the Court has no power to compel them to repay the money on the petition of the Plaintiff. Where solicitors have been guilty of even gross negligence in the conduct of a cause, the Court has no summary jurisdiction to give relief on petition. [*Dixon v. Wilkinson*] . 614

NOTICE.

Although, as a general rule, notice to one of several trustees is a notice to all, yet where one of such trustees was also a beneficiary, and assigned his beneficial interest in the trust fund to a stranger: Held, that the notice acquired by such trustee as assignor, did not constitute notice to the trustees so as to prevail over subsequent incumbrancers, it being the interest of such trustee, as assignor, to conceal the assignment; but that where such trustee assigned his beneficial interest to one of his co-trustees, the notice which that co-trustee acquired, as assignee, constituted during his life notice to the trustees, it not being his interest, as assignee, to conceal the assignment, and, therefore, that it prevailed over subsequent incumbrancers with notice. [*Bronne v. Savage*] . 635

ORDERS.

When a decree for the common accounts has been obtained on an administration summons, the Court

has no power, under the 20th Order of 16th October, 1852, to vary or add to the decree in Chambers by directing an account for wilful default. [*Partington v. Reynolds*] 253

PARTIES.

A bill alleged, in par. 2, that on the marriage of the Plaintiff with the daughter of *R. C. Young*, no portion was given by *Young* to his daughter; but that previously to, and as an inducement to the marriage, *Young* represented to Plaintiff, and promised and contracted with him, that he, *Young*, would at his death leave to his daughter an equal share with his other children, and the marriage took place on the faith of that promise. In par. 7, it alleged that Plaintiff, on the issuing of a certain commission of lunacy by *Young* against Plaintiff, filed an affidavit containing these words:—"I say I believe that the said *R. C. Young* is not a man of considerable property, because, on my marriage with his daughter, he confessed his inability to give or provide her any marriage portion;" and that in reply *Young* filed another, stating thus: "The statement contained in the affidavit of the said *G. Barkworth* (the Plaintiff), that his reason for believing me not to be a man of considerable property is, that on his marriage with my daughter I confessed to him my inability to provide any marriage portion, is not correct; according to the best of my recollection and belief, the words I made use of on that occasion were:—"There will be no money for you now, but at my death she (meaning my late daughter *Mrs. Barkworth*) shall share with the rest of my children.'" *Young* died in 1855, surviving *Mrs. Barkworth*, having given away his property by

will, and not having, by his will or otherwise, made any provision for Mrs. *Barkworth* or her children. Held, on demurrer:—1. That the Statute of Frauds may be set up by demurrer. 2. That the allegation in par. 1 was only of a verbal agreement. 3. That the allegation of the statement by affidavit in par. 7, was an allegation of a sufficient note or memorandum in writing of the verbal agreement. 4. That such a memorandum, though written after the marriage, was sufficient. 5. That the agreement might have been performed in two ways; by *Young* making a provision by will for his daughter, or by dying intestate; and that, though he was precluded by his daughter's death from performing it in the first way, he was not thereby exonerated from making a provision in the way still open to him, of dying intestate; and, therefore, the Plaintiff's bill, praying for an equal share of testator's residuary estate, was not on that ground demurrable. But held, that the representatives of the deceased daughter ought to have been parties. [*Barkworth v. Young*] . 1

PARTNERSHIP.

A bill by a company alleged that the Defendant had agreed to accept shares. The articles of association were silent as to the mode of acceptance, and the Joint Stock Companies Act, 1856, sect. 9, and sched. B. applied, by which the acceptance must be in writing signed. Defendant had never signed an acceptance. This fact and the statute were set up by plea. Held, 1. The plea was bad in form, as it raised no fact not raised by the bill. 2. The agreement was a good agreement to do that which the statute required. 3. The de-

cree would not be nugatory, as in a joint partnership a partner cannot put an end to the partnership, but only to his own quality of shareholder; he must remain shareholder, or constitute another person shareholder in his place. [*New Brunswick, &c. Company v. Muggerridge*] 686

PAYMENT OF FUND TO WIDOW.

Upon a petition by a widow for payment out of Court of money, to the payment of which she has become entitled since the death of her husband, the Court requires an affidavit that no settlement was made on her marriage with her late husband. [*Elrington v. Elrington*] 545

PAYMENT OUT OF COURT OF LEGACY.

A married woman who has obtained a protection order under the Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85, and 21 & 22 Vict. c. 108, may present a petition without a next friend, and the Court will order the payment out of Court to her of a legacy, to the payment of which she became entitled subsequently to her desertion by her husband. [*Rainsdon's Trusts, Re*] . . 446

PLEA.

A bill by a company alleged that the Defendant had agreed to accept shares. The articles of association were silent as to the mode of acceptance, and the Joint Stock Companies Act, 1856, sect. 9, and sched. B. applied, by which the acceptance must be in writing signed. Defendant had never signed an acceptance. This fact and the statute were set up by plea: Held, 1. The plea was bad

in form, as it raised no fact not raised by the bill. 2. The agreement was a good agreement to do that which the statute required. 3. The decree would not be nugatory, as in a joint stock partnership a partner cannot put an end to the partnership, but only to his own quality of shareholder; he must remain shareholder, or constitute another person shareholder in his place. [*New Brunswick, &c. Company v. Muggeridge*] 686

PLEADING.

1. A bill alleged, in par. 2, that on the marriage of the Plaintiff with the daughter of *R. C. Young* no portion was given by *Young* to his daughter; but that previously to, and as an inducement to the marriage, *Young* represented to Plaintiff, and promised and contracted with him, that he, *Young*, would at his death leave to his daughter an equal share with his other children, and the marriage took place on the faith of that promise. In par. 7, it alleged that Plaintiff, on the issuing of a certain commission of lunacy by *Young* against Plaintiff, filed an affidavit containing these words: "I say I believe that the said *R. C. Young* is not a man of considerable property, because, on my marriage with his daughter, he confessed his inability to give or provide her any marriage portion," and that in reply *Young* filed another, stating thus:—"The statement contained in the affidavit of the said *G. Barkworth* (the Plaintiff) that his reason for believing me not to be a man of considerable property is, that on his marriage with my daughter I confessed to him my inability to provide any marriage portion, is not correct; according to the best of my recollection and belief the words I made use of on that occasion

were:—"There will be no money for you now, but at my death she (meaning my late daughter *Mrs. Barkworth*) shall share with the rest of my children.'" *Young* died in 1855, surviving *Mrs. Barkworth*, having given away his property by will, and not having, by his will or otherwise, made any provision for *Mrs. Barkworth* or her children. Held on demurrer:

- 1. That the Statute of Frauds may be set up by demurrer.
2. That the allegation in par. 1 was only of a verbal agreement.
3. That the allegation of the statement by affidavit in par. 7 was an allegation of a sufficient note or memorandum in writing of the verbal agreement.
4. That such a memorandum, though written after the marriage, was sufficient.
5. That the agreement might have been performed in two ways; by *Young* making a provision by will for his daughter, or by dying intestate; and that though he was precluded by his daughter's death from performing it in the first way, he was not thereby exonerated from making a provision in the way still open to him, of dying intestate; and, therefore, the Plaintiff's bill, praying for an equal share of the testator's residuary estate, was not on that ground demurrable. But held, that the representatives of the deceased daughter ought to have been parties. [*Barkworth v. Young*] 1
2. Bill by the rector of the parish of *Whitechapel* against certain householders, claiming payments in respect of their houses, either as tithes or in lieu of tithes, or as a rate-tithe. The Plaintiff did not by his bill specifically state whether he claimed in respect of a *modus proper*, or of a special custom affecting all houses in the parish, or in respect of prescriptive rights affect-

ing the particular houses, but at the bar contended that there was a custom. With reference to the claim on the ground of *modus proper*, the evidence showed that the Plaintiff claimed a distinct annual sum as payable by the occupier of each house in the parish; and he claimed also an additional annual payment in respect of every additional building which might be erected on the site of any building already liable. With reference to the ground of prescription, the evidence showed that as to three of the Defendants, their houses had been erected within memory; as to the fourth, the date of the erection of his house not known, and a payment for 120 years was proved; but it appeared that the amount paid had varied; down to 1811 it was 8*s.* per year, and then it was increased to 14*s.* With reference to the ground of custom affecting all the houses in the parish whenever built, the custom alleged was, that as to new houses the annual amount payable was such as should be agreed upon, and if no agreement could be come to, then to be ascertained by reference to the amounts paid for other buildings of a like nature. There was no personal evidence of the custom; and the account-books referred to, though they showed payments, did not show on what certain principle the custom was founded. Held, that the claim could not be supported as a prescriptive right; and that, as grounded on a custom, first, the custom, if well alleged, was too uncertain; secondly, that it was not alleged with sufficient distinctness; and the bill was dismissed. [*Champneys v. Buchan*] . . . 104

3. A bill alleged that money had been placed in the hands of Defendants for certain payments, and

inquired into the application of such money. The answer averred that the particular sum had been, by agreement, placed in the hands of the Defendants without recourse from Plaintiff, and submitted that no discovery could be asked. Held, that all the circumstances might be essential in deciding the construction of the agreement, and the answer was insufficient. [*Bleckley v. Rymer*] 248

4. When a decree for the common accounts has been obtained on an administration summons, the Court has no power, under the 20th Order of 16th *October*, 1852, to vary or add to the decree in chambers by directing an account for wilful default. [*Partington v. Reynolds.*] 253

5. A bill of review must state on the face of it that it is filed with leave of the Court; if it does not it is demurrable. A general demurrer does not include, as a demurrer on the record, the ground of the bill (being a bill of review) not stating on the face of it that it is by the leave of the Court; but that ground may be taken *ore tenus*. A bill, purporting to be an original bill, sought to review a prior decree in a suit between the same parties, on the ground of the decree having been obtained by fraud; the fraud alleged was, that the Defendants had in their answer concealed certain facts from the Plaintiffs and the Court; but it appeared that those facts might have been elicited by exceptions. Held, that was not such fraud as to justify an original bill, without leave of the Court, to review a decree. [*Henderson v. Cook*] 306

6. A bill, setting up a case that an absolute conveyance of an equity of redemption was made to the Defendants on the faith of a verbal

promise to re-convey on being paid the price, alleged that the effect of the agreement was so, but did not set out the terms of the agreement *totidem verbis* as a fact. Held, that there was a sufficient allegation of a promise, and that the Court could not say on demurrer that there could be no relief. [*Morison v. Morison*] 315

POST-NUPTIAL SETTLEMENT.

A post-nuptial settlement was made by A. and his wife of a share of real and personal estate of the wife, in the hands of trustees. No notice was given to the trustees, and no fine was levied. The deed recited the ante-nuptial agreement, but it was proved that there never was any. The effect of the settlement was to give the husband a life estate, with remainder absolutely to the survivor, and there was no provision for children. Held, both husband and wife desiring it, that this deed was a nullity. That as against the husband it was voluntary; and that it was not such a settlement as the Court would enforce against the wife. The property was therefore treated as if it had never been settled. [*Hogarth v. Phillips*] 360

POWER.

1. The deed of settlement of a banking company contained clauses, empowering the directors to pay and allow to the servants of the company such remuneration, salaries and wages as the court of directors should think proper, and to confirm any contract, and all acts done by persons acting as directors in relation to the formation and establishment of the com-

pany. The provisional directors entered into a contract with a manager to pay him a salary, and and if the bank should discontinue business before the term agreed upon, to pay him 1,000*l.* a year for three years, such contract to be confirmed by the proprietary or a board duly authorized. Held, that the directors alone had power to confirm that contract by deed. [*Wilkins v. Roebuck*] . . . 281

2. A power to a married woman to appoint at any time or times during her life by any deed or instrument in writing, to be sealed and delivered in the presence of two or more witnesses, is well executed by an appointment by will before the Wills Act, sealed and delivered, as well as signed and published in the presence of three witnesses. [*Orange v. Pickford*] . . . 363

3. Where the donee exercises a power of appointment in favor of one of the several objects of the power, with a view to the benefit of a stranger, the appointment is fraudulent and void, even although the appointee is ignorant of the fraud, and the motive of the donee is not morally wrong. Therefore, where a married woman having a power to appoint a fund, of which she received the income for her life, among her children, appointed the whole fund at her death to her eldest daughter, in order that thereout the daughter should benefit her father, but the daughter was not informed of the mother's intention until after her mother's death: Held, that such appointment was void. [*In re Marsden's Trust*] 594

POWER OF LEASING.

The trustees of a marriage settlement, containing a power of leasing "for

any term or number of years not exceeding twenty-one years," agreed to grant a lease of the mansion house and grounds for a term of twenty-one years, determinable at the option of the lessee at the end of the first seven or fourteen years of the term. Held, that such a lease was within the power. [*Edwards v. Millbank*] 606

POWERS.

1. The charter and deed of a company gave to a general meeting power to authorize the council to sell or mortgage. The council, in pursuance of a direction of a general meeting, received authority to mortgage. They made a mortgage with a power of sale. Held, that they had no authority to give a power of sale. Discussion of the powers of trustees having a special power. [*Clarke v. The Royal Panopticon*] 26
2. A testator being entitled to certain personal property, derived indirectly through the wills of A. and of his father, settled part of it on his marriage, with a power of appointment among his children, leaving a fractional part in himself. He made his will, "giving and bequeathing" all the personal estate that he derived through the will of his father to his two daughters, exclusively of his other children. Held, that the fractional part reserved to himself satisfied the language of the gift, and it was not an execution of his special power. [*Noel v. Noel*] . . . 624
3. Where there is a primary power, and in default of appointment a secondary power, a partial exercise of the primary power does not exclude the exercise of the secondary power. *Simpson v. Paul*,

2 Eden, 77, disapproved. [*Mapleton v. Mapleton*] . . . 515

4. Power to husband to appoint among children and issue of children living at wife's death; in default of appointment, power to wife to appoint to children and issue of children living at husband's death. The husband appointed to four children only, leaving a fifth living at his death, with issue. After his death the fifth child died, leaving three children, one of whom, A., was living at the death of the first donee, the other two being born afterwards. The second donee, the wife, then appointed among her four children and to A., the eldest child of her deceased child. Held, that although the two others would have been objects of the primary powers, their exclusion by the joint operation of the two powers did not render the execution of either bad. [*Ibid.*]

PRACTICE.

1. The authority of the Court to order service out of the jurisdiction is entirely discretionary, and may be as well exercised to discharge an order made on an *ex parte* application as in granting or refusing the motion singly. [*Innes v. Mitchell*] 141
2. When a decree for the common accounts has been obtained on an administration summons, the Court has no power, under the 20th Order of 16th October, 1852, to vary or add to the decree in Chambers by directing an account for wilful default. [*Partington v. Reynolds*] 253
3. A solicitor's lien is not a general lien on a fund in Court, though brought in by his exertions, but only on what may, on the issue of

- the suit, belong to his client. Therefore, where by the exertions of a Plaintiff's solicitor, a fund was ordered to be brought into Court, on which the Defendants had a primary claim, and afterwards Plaintiff changed his solicitor, and the parties were proceeding without bringing the fund into Court to divide it under compromise, without paying the Plaintiff's original solicitors. Held, that he had no lien on the fund; but it was ordered that no order should be made by compromise or otherwise for payment of any money to the Plaintiff without notice to the Plaintiff's original solicitor. [*Verity v. Wyld*] . . . 427
4. Although, where a Defendant at law has pleaded an equitable plea, this Court will not allow him by injunction to remove the cause into equity, yet if a Defendant, without pleading his equitable plea at law, comes into equity in the first instance, and asserts his equitable defence, the Court will interfere by injunction. [*Compertz v. Poo-ley*] . . . 448
5. Where a Defendant had resisted the Plaintiff's demand, and the parties were going into evidence, and then the Defendant having offered to do all the Plaintiff required except to pay his costs, and moving to dismiss without costs: Held, that such a motion could not be sustained; but there being dicta which might have misled him, the costs of the motion were made costs in the cause. And, *per Curiam*, an application to stay proceedings by a Plaintiff on payment of his costs, or of a Defendant to dismiss the bill without costs, may be sustained under circumstances where the Court can see its way by matter extrinsic to the merits. But on such an application the Court will never go into the merits. [*Wallis v. Wallis*] . . . 458
6. The 21 & 22 Vict. c. 27, intends a jury to be called only where before an issue would have been directed, and therefore, where a cause was ready to be heard, the Court refused to call a jury to try certain issues of fact. *George v. Whitmore* (7 W. R. 225) approved. [*Bradley v. Bevington*] . . . 511
7. Upon a petition by a widow for payment out of Court of money, to the payment of which she has become entitled since the death of her husband, the Court requires an affidavit that no settlement was made on her marriage with her late husband. [*Elington v. Elington*] . . . 545
8. Although under the old practice it was not competent for a Plaintiff to issue *subpoena* to hear judgment until after the period for passing publication, yet under the new practice, created under the 15 & 16 Vict. c. 86, s. 38, and the 32nd Order of the 7th of August, 1852, and the 5th Order of the 13th January, 1855, a Plaintiff may issue a *subpoena* to hear judgment, and set down the cause for hearing after the closing the evidence, and during the period allowed for cross-examination, even when that period has been enlarged by order. [*Dowson v. Solomon*] . . . 642

PREScriptive CLAIM OF PAYMENT IN LIEU OF TITHES.

Bill by the rector of the parish of *Whitechapel* against certain householders, claiming payments in respect of their houses, either as tithes or in lieu of tithes, or as a rate-tithe. The Plaintiff did not by his bill specifically state whether he claimed in respect of a *modus*

proper, or of a special custom affecting all houses in the parish, or in respect of prescriptive rights affecting the particular houses, but at the bar it was contended that there was a custom. With reference to the claim on the ground of *modus* proper, the evidence showed that the Plaintiff claimed a distinct annual sum as payable by the occupier of each house in the parish; and he claimed also an additional annual payment in respect of every additional building which might be erected on the site of any building already liable. With reference to the ground of prescription, the evidence showed that as to three of the Defendants their houses had been erected within memory; as to the fourth, the date of the erection of his house was not known, and a payment for 120 years was proved, but it appeared that the amount paid had varied; down to 1811 it was 8*s.* per year, and then it was increased to 14*s.* With reference to the ground of custom affecting all the houses in the parish, whenever built, the custom alleged was, that as to new houses the annual amount payable was such as would be agreed upon, and if no agreement could be come to, then to be ascertained by reference to the amounts paid for other buildings of a like nature. There was no personal evidence of the custom; and the account-books referred to, though they showed payments, did not show on what certain principle the custom was founded. Held, that the claim could not be supported as a prescriptive right; and that, as grounded on a custom, first, the custom, if well alleged, was too uncertain; secondly, that it was not alleged with sufficient

distinctness; and the bill was dismissed. [*Champneys v. Buchan*] 104

PRIORITIES.

A., an articled clerk to B., a solicitor, and also his step-son, lent him 1,500*l.* on the promise of a security on lands. He asked for the title-deeds, but omitted to require possession of them before advancing the money, on the mortgagee's stating he should have them, but could not immediately lay his hands upon them. Afterwards, finding the mortgagee embarrassed, he pressed for and obtained an assignment. The property was afterwards found to be under equitable mortgage to C. Held, that B.'s knowledge did not affect A. with constructive notice, and that the circumstances were not such as to amount to fraudulent negligence in A. so as to postpone him to C. [*Espin v. Pemberton*] 333

PRIVILEGE.

The same privilege with respect to the non-production of confidential communications as between an English solicitor and his client is extended to like communications as between a Scotch solicitor and law agent practising in London (though not admitted an English solicitor) and his client in Scotland. [*Lawrence v. Campbell*] . . 485

PRODUCTION OF DOCUMENTS.

A bill was filed by a legatee of a legacy charged on a term of years, against the trustee, and against the mortgagee of the term under a mortgage made by the surviving trustee, who had power to give

receipts. The bill made a case against the mortgagee of knowledge of circumstances which affected him with a breach of trust, but did not allege that the deed disclosed those circumstances. The mortgagee's answer admitted the deed, and craved leave to refer to it when produced, but denied the notice. Held, that the Plaintiff could not have production of the mortgage deed. [*Howard v. Robinson*] 522

PROTECTION ORDER.

A married woman who has obtained a protection order under the Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85 and 21 & 22 Vict. c. 108, may present a petition without a next friend, and the Court will order the payment out of Court to her of a legacy to the payment of which she became entitled subsequently to her desertion by her husband. [*Rainsdon's Trusts, Re*] 446

RAILWAY COMPANY.

The Lands Clauses Consolidation Act, s. 80, contemplates not one application in respect of several re-investments, but several applications, and where it was shown to be "for the benefit of the parties," the Court ordered a company to pay the costs of a third re-investment in a very small purchase. [*The Trustees of St. Bartholomew's Hospital*] 425

RECEIVER'S POUNDAGE.

A. was sole legatee and executor of the testator's personal estate, and tenant for life of his real estate, with remainder to his son. At the death of the testator he was largely indebted and his personal estate

was outstanding, owing, as to the greater part, to his having advanced large sums to a bank, of which his son was a partner, and which failed and became bankrupt. For a long period, about eleven years, the tenant for life kept down the interest of the debts out of his life estate, which was wholly or nearly absorbed by such payment. Ultimately, enough personalty was got in to pay a large portion of the debts, and was so applied; and then the real estate was sold. Held, that no portion of the money representing the *corpus* of the real estate could be applied in recouping the tenant for life the interest he had paid. A receiver had been appointed both of the real and personal estate. Held, that the tenant for life must bear the receiver's poundage. [*Shore v. Shore*] 501

RECTORY.

The 17 Geo. 3, cap. 53, enables the incumbent of a living, with the consent of the bishop and patron, to add to as well as to repair or rebuild a rectory house, and necessary or sufficient repairs under that Act means such repairs or additions as the bishop thinks fit for making the rectory a fit and comfortable habitation for a clergyman. [*Boyd v. Barker*] . 583

RELIEF.

A bill by A. against B. and C. (within the jurisdiction) alleged that B. had obtained possession of real estate in *Scotland*, to which A. was entitled as heir under a testamentary instrument, by fraudulently procuring a decree of a Scotch court establishing the title of B. as heir; alleging also gross frauds by C. in respect of the personal estate, and that B. had assisted in

them, but admitting that B. had no interest in the personal estate and had nothing to do with it. The bill prayed an account of personal estate, and of rents and profits of the real estate, and costs against both Defendants. The testamentary instrument was the title both of the real and personal estate, and both estates were included in the same set of trusts. Held, on demurrer, that the bill was not multifarious, and that the prayer for costs against B. prevented the bill from being demurrable. [*Innes v. Mitchell*] 57

REMAINDERMAN.

1. In the administration of a mixed estate, real and personal, where, owing to peculiar circumstances, considerable time has elapsed before the personal estate can be realized, and in the meantime interest runs upon debts and has been paid out of the income of the tenant for life of the real estate, the Court will investigate the application of the personal estate, so as to determine the equities between the tenant for life and the remainderman. [*Shore v. Shore*] . . . 219
2. Testator had leaseholds, one he assigned to his partner, who, after testator's death, took another partner A. and became bankrupt. The bankrupt repudiated the leaseholds, and A., under the direction of the Court, paid 100*l.* to the executors to release him from liability, and re-assigned the lease to the executors. The testator had bequeathed his residue for life, with remainder over. Held, that as to rent due at the death of the testator, and subsequent rent and dilapidations, the *corpus*, and not the tenant for life, must bear them. [*Allen v. Embleton*] . . . 226

3. Testator devised his estate upon trust during lives out of the rents to pay his debts, &c., to keep up the mansion house, to pay an annuity to his daughters, and subject thereto to pay the rents to his wife and daughters. There were mortgages which exhausted the rents. Held, that one of the daughters and the wife might have part of the estates sold to pay off the mortgages. [*Cooke v. Cholmondeley*] 244

RESULTING TRUST.

1. Limitation of an incorporeal hereditament to A., his heirs and assigns, for lives. A. conveys it to trustees, their executors and administrators, upon contingencies which never happened. Held, that he had parted with his whole estate at law; but with a resulting beneficial interest in him in so much as he had limited on the contingencies. [*Northern v. Carnegie*] . . . 587
2. The word "survivors" held, on the context, to mean strictly "survivors," and not "others." [*Ibid.*]
3. *Semble*, that an executor may be special occupant of an incorporeal hereditament. [*Ibid.*]

REVIEW, BILL OF.

A bill of review must state on the face of it, that it is filed with the leave of the Court; if it does not, it is demurrable. A general demurrer does not include, as a demurrer on the record, the ground of the bill (being a bill of review) not stating on the face of it that it is by leave of the Court; but that ground may be taken *ore tenus*. A bill, purporting to be an original bill, sought to review a prior decree in a suit between the same parties, on the ground of the decree having been obtained by fraud; the fraud alleged was, that

the Defendants had in their answer concealed certain facts from the Plaintiffs and the Court; but it appeared that those facts might have been elicited by exceptions. Held, that was not such fraud as to justify an original bill, without leave of the Court, to review a decree. [*Henderson v. Cook*] 306

RULE IN SHELLEY'S CASE.

A devise by will to A. for will; remainder to A.'s children and their heirs as tenants in common. Devise by codicil of after-purchased estates to A. for life, remainder to the heirs of his body lawfully begotten for ever, equally share and share alike, sons or daughters, but if A. should die without heirs or heir, then over. Held, that A. took an estate tail in the property devised by the codicil. [*Grimson v. Downing*] 125

SALE.

1. The particulars of sale described the thing to be sold as an improved ground rent, amply secured, and stated the property to be held under a sub-lease of the full term of the ground lease. The conditions of sale provided that no objection should be taken by reason of the sub-lease being in excess of the superior lease; and offered previous inspection of the leases; and provided that the purchaser should be held to have notice of the leases, and their effect, whether he inspected or not. Held, that the particulars disclosing the facts, and the conditions referring to the facts, the purchaser was bound, though the particulars and conditions did not particularly state the legal effect, particularly having regard to the circumstance that

inspection was offered. [*Smith v. Watts*] 338

2. A pawnbroker bought the stock of a trader in a hasty manner, and without making any enquiries whether he was indebted, or why he wanted to sell in a hurry. There were other circumstances of suspicion as to the *bona fides* of the sale, particularly that the purchaser did not call the vendor as a witness; due change of possession took place, but no public manifestation of it was made. The vendor was at the time of the sale liable to process for debt, and a few days after the sale execution issued. Held, first, that, if *bona fide* for valuable consideration, a sale of goods is not invalidated by knowledge that an execution is intended (following *Wood v. Dixie*, 9 Q. B. 892). Secondly. That there being proof of payment and change of possession, the circumstances of suspicion did not amount to proof of fraud, and the purchase was good against the execution creditor. The suit was an interpleader suit by the sheriff:—Held, that the sheriff was entitled to his costs of suit against the parties setting him in motion, but not in this suit to his costs of possession. [*Hale v. Saloon Omnibus Company*] 492

SATISFACTION.

Where a debtor gives a legacy to his creditor, the Court will lay hold of minute discrepancies between the debt and the thing given, to rebut satisfaction. Thus, where a debtor gave 400*l.* to a creditor to whom he owed 145*l.*, and gave him also other large benefits by way of life estates, and remainders in real and personal estate, and expressly directed his debts and legacies to be paid, it was held, that the debt was

not satisfied by the legacy or any others of the benefits given. [*Has-sell v. Hawkins*] 468

SCOTCH SOLICITOR AND LAW AGENT.

The same privilege with respect to the non-production of confidential communications as between an English solicitor and his client, is extended to like communications as between a Scotch solicitor and law agent practicing in *London* (though not admitted an English solicitor) and his client in *Scotland*. [*Lawrence v. Campbell*] . . 485

SEISIN.

1. A title more than sixty years old commenced by a general devise; a deed more than sixty years old recited the seisin of the devisor. Held, that that, coupled with the continued possession, was sufficient evidence of seisin. [*Parr v. Lovegrove*] 170
2. A title first shown, when the abstract states all the matters which, if proved, make a good title. A title is made when the matters are proved. [*Ibid.*]
3. Where a title commenced by a general devise, and seisin only proved as stated in proposition 1, and there was ground to assume than the vendor had deeds earlier than those on the abstract. Held, the purchaser was entitled to inspection of those deeds, if in the vendor's possession, but not to have them on the abstract. Whether a purchaser is generally entitled to inspection of deeds earlier than a sixty years' title, *quære*. [*Ibid.*]

SEPARATE ESTATE.

1. A trustee or an apparent trustee for A., who was in possession of

an estate, was also committee of B., a lunatic, who claimed the estate, and the trustee was perfectly aware of the claim. On a bill being filed to recover the estate for B., it was decided that the estate was his. Held, that the trustee was liable to B. for the rents received by him and paid to A. [*Wright v. Chard*] . 673

2. The rule of the Court of Chancery, in a suit to recover land in the nature of equitable ejectment, is not that the Court never gives an account of rents beyond the filing of the bill, but it is a rule of discretion, and where the circumstances justified delay the Court gave an account of rents antecedent to the filing of the bill. [*Ibid.*]
3. Where a married woman received rents of an estate as her separate property, claiming to be entitled, but it turned out that she was not entitled, the Court refused to give relief to the real owner against her other separate estate. [*Ibid.*]
4. *Seemle*, that a married woman may make her separate estate liable by parol engagement as well as by express contract, but there must be some engagement or contract. [*Ibid.*]

SEPARATE USE.

Real estate devised to A., the wife of B., her heirs and assigns for ever, independent of B., for her separate use and benefit, with power to appoint, and in default remainder over. Personal estate to A. for her sole and separate use, independent of her husband B., and her receipts alone to be sufficient discharges: Held, that the limitations to the separate use of A. did not extend beyond the husband specifically named. [*Moore v. Morris*] 33

SERVICE.

Upon a petition by an assignee for the payment out of Court of a fund standing to the credit of an assignor, the Court requires the assignor to be served, unless there has been an absolute assignment of the precise fund, even where the total funds assigned exceed the fund in Court. [*Briani v. Dennett*] 550

SERVICE OUT OF THE JURISDICTION.

The authority of the Court to order service out of the jurisdiction is entirely discretionary, and may be as well exercised to discharge an order made on, an *ex parte* application as in granting or refusing the motion singly. [*Innes v. Mitchell*]

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SET OFF.

1. Where a Plaintiff had been ordered to pay costs to Defendants, and Defendants issued execution for those costs, but the sheriff had made no return on the writ, and the same Defendants were subsequently ordered to pay the Plaintiff costs of a less amount, the Court granted the Defendants leave to set off the costs the Defendants had been ordered to pay the Plaintiff on the Defendants undertaking not to levy more on the execution than the balance of costs remaining due to them after such set off. The Defendants not having asked for a set off when the order against them for costs was made, the Court made the order for a set off without costs. [*Bryon v. Metropolitan Saloon, &c. Company*] 546
2. Where a bill was dismissed with costs as against husband and wife, so far as it sought to charge the

wife's separate estate, and the husband was ordered to make certain payments to the Plaintiff in respect of another demand in the same suit: Held, that the costs of so dismissing the bill as against the husband and wife were payable by the Plaintiff to the husband alone; and also that the Plaintiff was entitled to set off these costs against the amounts so ordered to be paid by the husband to him. [*Wright v. Chard*] 702

SHERIFF.

A pawnbroker bought the stock of a trader in a hasty manner and without making any enquiries whether he was indebted, or why he wanted to sell in a hurry. There were other circumstances of suspicion as to the *bona fides* of the sale, particularly that the purchaser did not call the vendor as a witness; due change of possession took place, but no public manifestation of it was made. The vendor was at the time of the sale liable to process for debt, and a few days after the sale execution issued. Held, first, that if *bona fide* for valuable consideration a sale of goods is not invalidated by knowledge that an execution is intended (following *Wood v. Dixie*, 9 Q. B. 892). Secondly, that there being proof of payment and change of possession, the circumstances of suspicion did not amount to proof of fraud, and the purchase was good against the execution creditor. The suit was an interpleader suit by the sheriff. Held, that the sheriff was entitled to his costs of suit against the the parties setting him in motion, but not in this suit to his costs of possession. [*Hale v. Saloon Omnibus Company*] 492

SHIFTING CLAUSES.

Edmund Turton was tenant for life of the *Turton* estate, and his eldest son *Edmund Henry Turton* was tenant in tail expectant. *Robert Bell Livesey* devised his real estates upon several series of limitations for life, with remainder to the sons of the tenant for life in tail, and among those limitations was a limitation for 'life to *E. H. Turton* for life, remainder to trustees to preserve, remainder to his second and other sons in tail. Then followed several limitations, and among them was a limitation to the Plaintiff for life; and he concluded by a proviso, that in case *R. C. Turton*, one of the tenants for life, or the heirs of his body, or any other tenant for life or in tail, should become seised of the settled family estates of *Edmund Turton*, then the limitations of his will in favor of such persons should cease, as if he, she or they were dead, and the estates so limited were to go to the persons next entitled in remainder, it being his will that both the estates should not vest in the same person, except as was otherwise hereinbefore provided. And there was no such express provision in the will. In the events which happened, *Edmund Henry Turton*, the eldest son of *Edmund Turton*, became seised of the *Turton* estates, and was the person (if it had not been for the proviso for cesser), entitled as tenant for life of the devised estates. He had no second or third sons, and he entered into possession. The next limitation in terms was to the trustees to preserve, and the next tenant for life was, in the events, the Plaintiff. Held, that *Edmund H. Turton* was not ex-

cepted out of the proviso by the concluding paragraph of it, and that the persons entitled were the trustees to preserve contingent remainders for the unborn second and other sons of *Edmund Henry Turton*. (And see general propositions laid down at the conclusion of the judgment.) [*Lambarde v. Peach*] 553

SOLICITOR.

Where *A. & Co.* are solicitors for a Plaintiff and also for the receiver, and the receiver remits to them money to be paid into Court in respect of his balances, which money they misapply, the Court has no power to compel them to repay the money on the petition of the Plaintiff. Where solicitors have been guilty of even gross negligence in the conduct of a cause, the Court has no summary jurisdiction to give relief on petition. [*Dixon v. Wilkinson*] 614

SOLICITOR'S LIEN.

A solicitor's lien is not a general lien on a fund in Court, though brought in by his exertions, but only on what may, on the issue of the suit, belong to his client. Therefore, where, by the exertions of a Plaintiff's solicitor, a fund was ordered to be brought into Court on which the Defendant had a primary claim, and afterwards the Plaintiff changed his solicitor, and the parties were proceeding without bringing the fund into Court to divide it under compromise, without paying the Plaintiff's original solicitors:—Held, that he had no lien on the fund; but it was ordered that no order should be made by compromise or otherwise for payment of any money to the Plaintiff

without notice to the Plaintiff's original solicitor. [*Verity v. Wylde*] 427

SPECIAL OCCUPANCY.

1. Limitation of an incorporeal hereditament to A., his heirs and assigns, for lives. A. conveys it to trustees, their executors and administrators, upon contingencies which never happened. Held, that he had parted with his whole estate at law, but with a resulting beneficial interest in him in so much as he had limited on the contingencies. [*Northen v. Carnegie*] . . . 587
2. The word "survivors" held on the context to mean strictly "survivors," and not "others." [*Ibid.*]
3. *Seemle*, that an executor may be special occupant of an incorporeal hereditament. [*Ibid.*]

SPECIALTY DEBT.

The acknowledgment provided for by the 5th section of the 3 & 4 Will. 4, c. 42, in order to take a specialty debt out of the operation of that statute, need not be made by the person chargeable to the person entitled, or amount to a promise to pay. Held, therefore, that an admission of a bond debt, contained in the answer of the executors of the obligor in a suit to which the obligee was not a party, was sufficient to take the bond debt out of the operation of that statute. A residuary legatee may set up the Statute of Limitations as against creditors in an administration suit, though the executors do not take the objection. [*Moodie v. Bannister*] 432

SPECIFIC PERFORMANCE.

1. An agreement for sale of leasehold premises and the goodwill of

a trade and certain fixtures, to be taken at a valuation to be made by two gaugers to be named, or their umpire. Held, that the Court could not decree specific performance of an agreement, one part of which was left to be determined by arbitration. [*Darbey v. Whitaker and another*] . . 134

2. Though the Court may entertain a strong opinion in favor of the title of a party, if it were a contest between him and another claiming title, that is not sufficient in a suit for specific performance. To force a title on a purchaser, the opinion of the Court must be so clear that it does not apprehend that another judge would form a different opinion. [*Rogers v. Waterhouse*] 329

3. The Court will enforce specific performance of a contract to purchase chattels, if damages will not be an adequate compensation. But where the contract, although not actually fraudulent, was one in which the parties were not on an equal footing, the Plaintiff knowing, and the purchaser being ignorant, of the value of the thing sold, and the price appeared to be inadequate, the Court refused relief. [*Falcke v. Gray*] . . 165

STATUTE OF LIMITATIONS.

The acknowledgment provided for by the fifth section of the 3 & 4 Will. 4, c. 42, in order to take a specialty debt out of the operation of that statute, need not be made by the person chargeable to the person entitled, or amount to a promise to pay. Held, therefore, that an admission of a bond debt, contained in the answer of the executors of the obligor in a suit to which the obligee was not a party, was sufficient to take the

bond debt out of the operation of that statute. A residuary legatee may set up the Statute of Limitations as against creditors in an administration suit, though the executors do not take the objection. [*Moodie v. Bannister*] 432

STATUTES.

1. Devise in 1826 to his son A. for life, remainder to his son's first and other sons in tail. A. died in 1827, leaving his son tenant for life. The tenant for life died on the 18th of July, 1853, leaving B., his eldest son, surviving, who was born before the 19th May, 1853. The Succession Duties Act was passed on the 4th August, 1853, but came into operation on the 19th May. Held, that B. was within the act, and succession duty attached. [*Wilcox v. Smith*] . . . 40
2. The 11 & 12 Vict. c. 63, and the 21 & 22 Vict. c. 98, do not give to a local board of health power to go out of their district to make sewers. [*Haywood v. Lowndes*] . . 454
3. The 17 Geo. 3, c. 53, enables the incumbent of a living, with the consent of the bishop and patron, to add to as well as to repair or rebuild a rectory house, and necessary or sufficient repairs under that act means such repairs or additions as the bishop thinks fit for making the rectory a fit and comfortable habitation for a clergyman. [*Boyd v. Barker*] . 583

STAY OF PROCEEDINGS.

Where a Defendant had resisted the Plaintiff's demand, and the parties were going into evidence, and then the Defendant having offered to do all the Plaintiff required except to pay his costs, and moving to dismiss without costs: Held, that such a motion could not be sus-

tained; but there being dicta which might have misled him, the costs of the motion were made costs in the cause. And, *per Curiam*, an application to stay proceedings by a Plaintiff on payment of his costs may be sustained under circumstances where the Court can see its way by matter extrinsic to the merits. But on such an application the Court will never go into the merits. [*Wallis v. Wallis*] 458

SUBPÆNA TO HEAR JUDGMENT.

Although under the old practice it was not competent for a Plaintiff to issue *subpœna* to hear judgment until after the period for passing publication, yet under the new practice, created under the 15 & 16 Vict. c. 86, s. 38, and the 32nd Order of the 7th August, 1852, and the 5th Order of the 13th January, 1855, a Plaintiff may issue a *subpœna* to hear judgment, and set down the cause for hearing after the closing the evidence, and during the period allowed for cross-examination, even when that period has been enlarged by order. [*Dowson v. Solomon*] . . 642

SUBSTITUTION.

Gift "to survivors of a class and the issue of such survivor, such issue to take the parents' share only," is a gift to the parents for life with remainder to their children, and not a substitutionary gift. [*Parsons v. Coke*] . . . 296

SUCCESSION DUTY.

Devise in 1826 to his son A. for life, remainder to his son's first and other sons in tail. A. died in 1827, leaving his son tenant for

life. The tenant for life died on the 18th July, 1853, leaving B., his eldest son, surviving, who was born before the 19th May, 1853. The Succession Duties Act was passed on the 4th August, 1853, but came into operation on the 19th May. Held, that B. was within the act, and succession duty attached. [*Wilcos v. Smith*] 40

SUMMARY JURISDICTION.

Where A. and Co. are solicitors for a Plaintiff, and also for a receiver, and the receiver remits to them money to be paid into Court in respect of his balances, which money they misapply, the Court has no power to compel them to repay the money on the petition of the Plaintiff. Where solicitors have been guilty of even gross negligence in the conduct of a cause, the Court has no summary jurisdiction to give relief on petition. [*Dixon v. Wilkinson*] 614

SURRENDER AT OPTION OF LESSEE.

The trustees of a marriage settlement containing a power of leasing "for any term or number of years not exceeding twenty-one years," agreed to grant a lease of the mansion house and grounds for a term of twenty-one years, determinable at the option of the lessee at the end of the first seven or fourteen years of the term. Held, that such a lease was within the power. [*Edwards v. Millbank*] 606

TENANT FOR LIFE.

1. In the administration of a mixed estate, real and personal, where owing to peculiar circumstances, considerable time has elapsed before the personal estate can be realized, and in the meantime

interest runs upon debts and has been paid out of the income of the tenant for life of the real estate, the Court will investigate the application of the personal estate, so as to determine the equities between the tenant for life and the remainderman. [*Shore v. Shore*] 219

2. Testator had leaseholds, one he assigned to his partner, who, after testator's death, took another partner, A., and became bankrupt. The bankrupt repudiated the leaseholds, and A., under the directions of the Court, paid 100*l.* to the executors to release him from liability, and re-assigned the lease to the executors. The testator had bequeathed his residue for life, with remainder over. Held, that as to the rent due at the death of the testator, and subsequent rent and dilapidations, the *corpus*, and not the tenant for life, must bear them. [*Allen v. Embledon*] 226
3. Testator devised his estate upon trust during lives, out of the rents to pay his debts, &c., to keep up the mansion house, to pay an annuity to his daughters, and, subject thereto, to pay the rents to his wife and daughters. There were mortgages which exhausted the rents. Held, that one of the daughters and the wife might have part of the estates sold to pay off the mortgages. [*Cooke v. Cholmondeley*] 244

TENANT FOR LIFE AND REMAINDERMAN.

- A. was sole legatee and executor of the testator's personal estate, and tenant for life of the real estate, with remainder to his son. At the death of the testator he was largely indebted, and his personal estate was outstanding, owing, as to the

greater part, to his having advanced large sums to a bank, of which his son was a partner, and which failed and became bankrupt. For a long period, about eleven years, the tenant for life kept down the interest of the debts out of his life estate, which was wholly or nearly absorbed by such payment. Ultimately enough personalty was got in to pay a large portion of the debts, and was so applied, and then the real estate was sold. Held, that no portion of the money, representing the *corpus* of the real estate, could be applied in recouping the tenant for life the interest he had paid. A receiver had been appointed both of the real and personal estate: Held, that the tenant for life must bear the receiver's poundage. [*Shore v. Shore*]

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TRUSTEE.

1. There is no positive rule, that a trustee cannot buy from his *cestui que trust*; nor that an assignee in bankruptcy may not buy from a creditor his dividends. But when an assignee bought from a creditor, not in his own name, but in the name of a stranger, and it was not clear that the creditor knew that he was selling to the assignee, the Court directed further enquiry. [*Pooley v. Quilter*] . . . 184
2. Although, as a general rule, notice to one of several trustees is notice to all, yet where one of such trustees was also a beneficiary, and assigned his beneficial interest in the trust fund to a stranger. Held, that the notice acquired by such trustee, as assignor, did not constitute notice to the trustees, so as to prevail over subsequent incumbrancers, it being the interest of such trustee, as assignor, to conceal the assignment; but that where such trustee assigned his beneficial interest to one of his co-trustees, the notice which that co-trustee acquired, as assignee, constituted during his life notice to the trustee, it not being his interest, as assignee, to conceal the assignment, and, therefore, that it prevailed over subsequent incumbrancers with notice. [*Browne v. Savage*] . 635
3. A trustee or apparent trustee for A., who was in possession of an estate, was also committee of B., a lunatic, who claimed the estate, and the trustee was perfectly aware of the claim. On a bill being filed to recover the estate for B., it was decided that the estate was his. Held, that the trustee was liable to B. for the rents received by him and paid to A. [*Wright v. Chard*] 673
4. The rule of the Court of Chancery, in a suit to recover land in the nature of equitable ejectment, is not that the Court never gives an account of rents beyond the filing of the bill; but it is a rule of discretion, and where the circumstances justified delay, the Court gave an account of rents antecedent to the filing of the bill. [*Ibid.*]
5. Where a married woman received rents of an estate as her separate property, claiming to be entitled, but it turned out that she was not entitled, the Court refused to give relief to the real owner against her other separate estate. [*Ibid.*]
6. *Semble*, that a married woman may make her separate estate liable by parol engagement as well as by express contract, but there must be some engagement or contract. [*Ibid.*]

TRUSTEES.

The deed of settlement of a bank-

ing company contained clauses empowering the directors to pay and allow to the servants of the company such remunerations, salaries and wages as the court of directors should think proper, and to confirm any contract and all acts done by persons acting as directors in relation to the formation and establishment of the company. The provisional directors entered into a contract with a manager to pay him a salary, and if the bank should discontinue business before the term agreed upon, to pay him 1,000*l.* a year for three years, such contract to be confirmed by the proprietary or a board duly authorized. Held, that the directors alone had power to confirm that contract by deed. [*Wilkins v. Roebuck*] 281

UNCERTAINTY.

A clear gift by a will to testator's son, on his attaining twenty-one, followed by limitations over, the construction of which was very doubtful: Held, that the rule applied, that a gift cannot be cut down except by limitations equally clear. [*Randfield v. Randfield*]

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USURY.

A loan of money on security of bills at six months and an agreement for a judgment; the judgment is void as against the land under the 2 & 3 Vict. c. 37, but is not void *in toto*. [*Bond v. Bell*] . . . 157

VENDOR AND PURCHASER.

1. A title more than sixty years' old commenced by a general devise; a deed more than sixty years' old recited the seisin of the devisor. Held, that that, coupled with the continued possession, was sufficient

evidence of seisin. [*Parr v. Lovegrove*] 170

2. A title is first shown when the abstract states all the matters which, if proved, make a good title. A title is made when the matters are proved. [*Ibid.*]

3. Where a title commenced by a general devise, and seisin only proved, as stated in Proposition 1, and there was ground to assume that the vendor had deeds earlier than those on the abstract. Held, that the purchaser was entitled to inspection of those deeds, if in the vendor's possession, but not to have them on the abstract. Whether a purchaser is generally entitled to inspection of deeds earlier than a sixty years' title, *quære*. [*Ibid.*]

4. In the absence of special circumstances, a purchaser has a right to insist on paying the purchase-money into the hands of the vendor; a verbal authority to the vendor's solicitor does not deprive the purchaser of this right; and, *semble*, that a power of attorney or other written authority would not. A purchaser has also a right to have the deeds executed in his presence, and attested by a witness of his own choosing. [*Vincy v. Chaplin*] 237

5. Though the Court may entertain a strong opinion in favor of the title of a party, if it were a contest between him and another claiming title, that is not sufficient in a suit for specific performance. To force a title on a purchaser, the opinion of the Court must be so clear that it does not apprehend that another judge would form a different opinion. [*Rogers v. Waterhouse*] 329

VESTRY.

A vestry meeting, in which a portion of the parishioners is excluded, is

a "meeting in the nature of an open vestry meeting," within the 19 & 20 Vict. c. 112, sec. 3. But the election of persons to derive benefit under a charity creating alms-houses, is not a duty, power or privilege within the meaning of that clause of the act. [*Attorney-General v. Drapers' Company*] 299

VOLUNTARY SETTLEMENT.

A person being in debt to the extent of 300*l.*, and having some other debts, applied to his mother for advances to pay the debts other than the 300*l.*; she, not knowing of the debt of 300*l.*, refused unless he would make a settlement of his property on his wife and children. Ultimately he acceded and did so, reserving to himself a life interest worth about 1,700*l.*, and he afterwards died insolvent, not having paid the 300*l.* Held, that the settlement was not, under the circumstances, made with intent to defraud creditors, and was good against the assignees of the insolvent. Statement of the rule as to voluntary settlements, p. 632. [*Thompson v. Webster*] 628

WILL.

A devise by will to A. for life, remainder to A.'s children and their heirs as tenants in common. Devise by codicil of after-purchased estates to A. for life, remainder to the heirs of his body lawfully begotten for ever, equally share and share alike, sons or daughters, but if A. should die without heirs or heir, then over. Held, that A. took an estate tail in the property devised by the codicil. [*Grimson v. Downing*] 125

2. Limitation by will to certain persons, with a direction that they should within twelve months next

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after becoming entitled in possession take testator's name and arms, and that if they should decline, neglect or discontinue such name and arms for twelve months after becoming entitled, their estates should go over. Held, that a donee who took the name and arms, and used them for some years after becoming entitled in possession, and then discontinued them for twelve months, had committed the forfeiture, and the remainders over took effect. [*Blagrove v. Bradshaw*] 230

3. A will contained a bequest of 1,000*l.* on trusts and of 5,000*l.* on trusts, and another bequest on trusts in which no sum was mentioned, but the language was continuous, and no actual blank was left. In another part of the will there was power to invest the said sum of 5,000*l.* and the said two sums of 1,000*l.* Held, that the latter clause was evidence that the testator intended a bequest of 1,000*l.* in the bequest, in which no sum was named. [*Edmunds v. Waugh*] 275

4. Testator directed that "within three months after his death, in case any child or children of his son should be then living, his executors should invest 5,000*l.* for such child, or, if more than one, for such children equally of his said son as should attain the age of twenty-one." A subsequent clause was to this effect: "And in case no child or children of my said son shall at my decease have attained, or shall afterwards attain, the age of twenty-one years," then over. Held, that the first clause was not a condition precedent, but merely pointed at the time of investment, and that though the son had no children the fund must be invested. [*Ibid.*]

4. Gift "to survivors of a class and the issue of such survivor, such issue to take the parents' share only," is a gift to the parents for life, with remainder to their children, and not a substitutionary gift. [*Parsons v. Coke*] . . . 296
5. By a will a sum of stock was given to trustees, out of the dividends to pay annuities to A., B. and C. for their lives, and after their deaths to pay the annuities to E., F. and G., without saying for life or otherwise; and after the death of survivor of E., F. and G., to pay the stock to H. Held, that the annuities were to endure till the death of the survivor, and the representative of a deceased annuitant was entitled till the death of the surviving annuitant. [*Big-nold v. Giles*] 343
6. A power to a married woman to appoint at any time or times during her life by any deed or instrument in writing, to be sealed and delivered in the presence of two or more witnesses, is well executed by an appointment by will before the Wills Act, sealed and delivered, as well as signed and published in the presence of three witnesses. [*Orange v. Pickford*] 363
7. *Edmund Turton* was tenant for life of the *Turton* estate, and his son *Edmund Henry Turton* was tenant in tail expectant. *Robert Bell Livesey* devised his real estates upon several series of limitations for life, with remainder to the sons of the tenant for life in tail, and amongst those limitations was a limitation for life to *E. H. Turton* for life, remainder to trustees to preserve, remainder to his second and other sons in tail. Then followed several limitations, and among them was a limitation to the Plaintiff for life; and he con-

cluded by a proviso, that in case *R. C. Turton*, one of the tenants for life, or the heirs of his body, or any other tenant for life or in tail, should become seised of the settled family estates of *Edmund Turton*, then the limitations of his will in favor of such persons should cease as if he, she or they were dead, and the estates so limited were to go to the persons next entitled in remainder, it being his will that both the estates should not vest in the same person, except as was otherwise hereinbefore provided. And there was no such express provision in the will. In the events which happened, *E. H. Turton*, the eldest son of *E. Turton*, became seised of the *Turton* estates, and was the person (if it had not been for the proviso for *cesser*) entitled as tenant for life of the devised estates. He had no second or third sons, and he entered into possession. The next limitation in terms was to the trustees to preserve, and the next tenant for life was, in the events, the Plaintiff. Held, that *E. H. Turton* was not excepted out of the proviso by the concluding paragraph of it, and that the persons entitled were the trustees to preserve contingent remainders for the unborn second and other sons of *E. H. Turton*. (And see general propositions laid down at the conclusion of the judgment.) [*Lambarde v. Peach*] 553

WINDING-UP ACTS.

- A benefit building society of the ordinary kind, certified under the 6 & 7 Will. 4, c. 32, is within the Winding-up Acts, 1848 and 1849. [*St. George's Building Society*] 154

WORDS.

1. Limitation by will to certain persons, with a direction that they

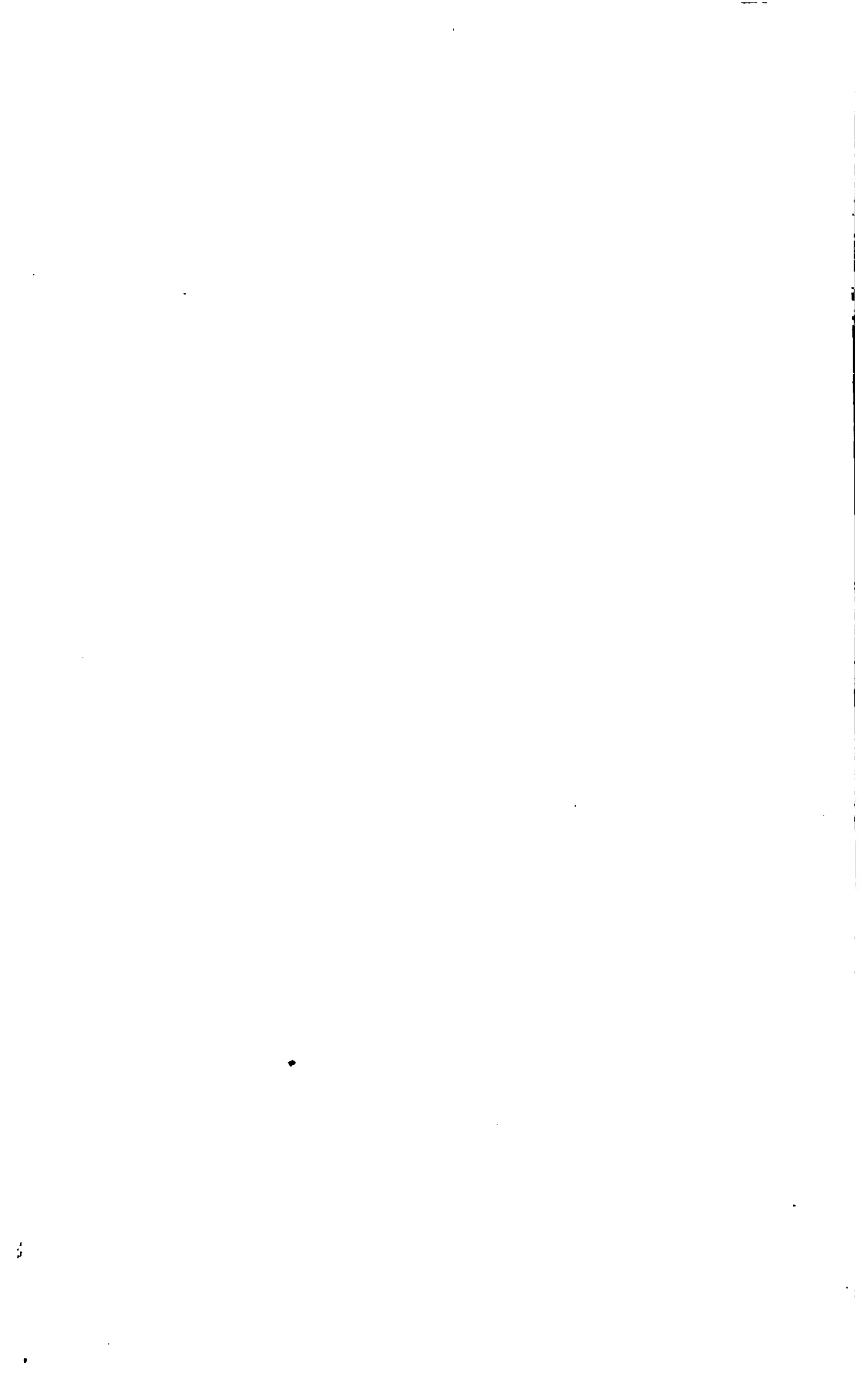
should, within twelve months next after becoming entitled in possession, take testator's name and arms, and that if they should decline, neglect or discontinue such name and arms for twelve months after becoming entitled, their estates should go over. Held, that a donee who took the name and arms, and used them for some years after becoming entitled in possession, and then discontinued them for twelve

months, has committed the forfeiture, and the remainders over took effect. [*Blagrove v. Bradshaw*]

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2. A direction to keep buildings in good repair, means, not the state of repair in which they were at the testator's death, but in habitable repair: "farming buildings" includes "farm houses." [*Cooke v. Cholmondeley*] 326

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